No. 6124.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Peter Connley and Herman F. Quirin,
Appellants,

vs.

The United States of America,
Appellee.

OPENING BRIEF OF APPELLANTS.

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THE CHARGE, VERDICT AND SENTENCE.

The appellants, Peter Connley and Herman F. Quirin, together with Nick Bruno and Joe Verda were tried upon an indictment charging in six counts as follows:

1 A violation of section 37 of the Federal Penal Code, that is, a conspiracy to transport, manufacture and possess large quantities of intoxicating liquor in violation of the National Prohibition Act;

2 The unlawful manufacture for beverage purposes of about thirteen hundred gallons of intoxicating liquor, in violation of the National Prohibition Act;

3 The unlawful possession of a still and distilling apparatus which had not been registered with the Collector of Internal Revenue as required by law;

4 The unlawful engaging in and carrying on the business of a distiller without having given bond as required by law with intent to defraud the United States of America of the taxes on the spirits distilled;

5 The unlawful making and fermenting of mash fit for distillation and for the production of spirits on certain premises other than a distillery duly authorized by law;

6 The unlawful possession of about thirteen hundred gallons of intoxicating liquor in violation of the National Prohibition Act. [Tr. pp. 2-11]

Nick Bruno and Joe Verda were acquitted on all counts. The appellant, Peter Connley, was convicted on all counts. Appellant, Herman F. Quirin, was convicted on the first count charging conspiracy and acquitted on the remaining counts of the indictment.

A motion for a new trial on behalf of each of the appellants was made and denied. Sentence was thereupon imposed on Peter Connley as follows:

> "To be imprisoned in the United States penitentiary at McNeil Island, Washington, for the term and period of one year and two months on the first count; two years on the second count; one year and two months on the third count; one year and one month on the fourth count; and one year and one month on the fifth count; sentences to run consecutively, making a total sentence of six years and six months; and in addition thereto, pay a fine into the United States of America in the sum of $4000.00, and court costs taxed at $947.22, and with respect to the sixth count, it appearing that this does not involve imprisonment, but a maximum fine of $500.00,

> which the imposition of fine of $4000.00 aforesaid covers, it is the further judgment of the court that said defendant stand committed until said fine of $4000.00 and costs, shall have been paid." [Tr. pp. 39-40.]

The defendant, Herman F. Quirin, was sentenced to be imprisoned

> "in the United States Penitentiary at McNeil Island, Washington, for the term and period of twenty-one months on the first count, and in addition thereto, pay unto the United States of America, a fine in the sum of $1000.00 and court costs taxed at $947.22 and stand committed until said fine and costs shall have been paid." [Tr. p. 40.]

An exception was noted by each appellant to the sentence imposed upon him. [Tr. p. 40.]

STATEMENT OF FACTS.

The testimony showed that for several years preceding the trial the defendant Nick Bruno had been the owner of a small ranch in the hills in Riverside county near the highway between Elsinore and Perris, a portion of the ranch being used for the raising of grain, the remainder being occupied by goat corrals, sheds, and a dwelling house.

The defendant Quirin lived on lands adjoining the Bruno ranch and his dwelling house was located on the Perris-Elsinore highway out of sight of the Bruno ranch, the Quirin land lying between the Bruno ranch and the highway.

The ranch of Bruno was enclosed by a fence in which there were two gates, both gates giving access upon roads which connected with the Perris-Elsinore highway. The

road upon which the front gate opened forked a short distance away from that gate. The South fork led directly by and joined the Perris-Elsinore highway at a point but a few feet distance from the house of Herman Quirin. The North fork opened upon that highway, some three or four hundred yards north of the Quirin house. The road upon which the back gate opened led around a range of hills and opened upon the Perris-Elsinore highway at a point about a mile nearer Elsinore than the Quirin house and out of the range of vision from that house. A road skirting the boundary line of the ranch connected these two roads.

Some hundred feet from the Quirin house there was the shaft of an old mine, partially filled with water and timbered to below the water line.

On January 21, 1930, Prohibition Agents Clements and Alles visited the Bruno ranch and found at the house on that ranch Joe Verda and a man who first gave his name as Walker and who was later identified as appellant, Peter Connley. Agent Clements searched the house and found in an apparently disused and otherwise vacant room, a copper column for a still. (Government's Exhibit No. 15.) The dining table in the house was set for seven persons. The ranch had been recently planted to grain.

The agents then found a shed containing a number of distillate barrels, a buried distillate tank, and, following a road down a little hill, discovered a pit in which was located a large still completely set up and attached to a boiler set over distillate burners which were connected with the buried tank by a small pipe. In this pit there were seven large vats of fermenting mash, each

containing five or six thousand gallons. The pit itself was roofed over with heavy timbers, with the exception of an opening about three feet square, giving access to the pit by means of a ladder, and an opening over the boiler and over each vat so that the various ingredients of the mash could be emptied into the vats from above. The still comprised two large copper columns, both of which extended ten or twelve feet above the level of the ground. These columns were surrounded and entirely concealed by a wooden chamber which was in turn completely concealed by a stack of baled hay, the top of which stack was covered with corrugated iron. The timbers, roofing the still pit, were covered with dirt and were level with the surrounding ground. Covers were provided to conceal the openings above referred to. From a distance of a few feet, the entire plant looked like an ordinary hay stack, the still, the pit and the vats being invisible. So successful was this camouflage, that from the buried tank about one hundred feet from the hay stack, the officers were not aware that the hay stack was other than it seemed.

Taking Connley and Verda with them, the agents, after discovering the buried tank, followed a little road or path to the hay stack. When they arrived at the opening giving access to the pit, Agent Clements asked Connley what was down in the hole. According to Clements and Alles, Connley replied in substance:

> There is no use of you fellows coming down here. We can fix this up all right. I know the owner of the still and we can all make some money on it.

The agents, however, accompanied by Connley, went down into the pit, discovering the still and fermenting

mash, as hereinbefore described, the boiler of the still at that time being still warm. They also found five-gallon cans containing alcohol and some alcohol in a cooling tank. Coming out of the pit, the agents placed Connley and Verda under arrest.

At the time the agents arrived, there were two or three men working in a field near the Bruno house on a pipe-line or on some lumber. One of them got on a truck which was standing near the house and drove off; the others walked across the fields into the hills. Agent Clements asked Connley what his connections were and he said he had been there about ten days; that he was a contractor and was building a water tank. There was lumber there upon which he was working.

According to Clements, Connley then asked him if there wasn't some way he could fix this up; that there was no use in anyone going to jail; that there was too much money invested and that it would be easy for all of them to make money.

Clements, who had taken the license number of the truck, followed it to the Perris-Elsinore highway and saw it standing near the Quirin house. He removed the rotor from the distributor; ascertained there was no one in, near or about the Quirin house, and went on to Elsinore to call for additional officers. Returning to the Quirin house with the Chief of Police of Elsinore, he found the truck gone and the appellant, Herman Quirin, in his home shaving. As the officers entered Quirin's home, the following conversation ensued, according to Clements' testimony on direct examination:

Quirin asked, "What do you mean by coming in here?"

Clements: "I have come over after you."

Quiring: "What are you going to do? Take me over and set me on the spot?"

Clements asked what became of the truck and Quirin answered that the man who owned the truck took it away; that he had seen this man a few times; did not know him by name but knew him when he saw him.

Quirin was then taken to the Bruno ranch and the statement being made that the ranch belonged to one Nick Bruno, Chief Barber was sent to Elsinore, where he arrested Bruno in the act of delivering a carload of goats and brought him to the Bruno ranch, at which time a push button was found in the Bruno house which operated a bell in the still pit. This push button was concealed behind a board on the wall. Barber questioned Connley, who said his name was Walker and denied he had an automobile or had a driver's license. An examination of a Ford car standing near the Bruno house, disclosed it to be registered in the name of Peter Connley and to contain a driver's license in that name. Barber testified he had seen Connley driving this car in and about Elsinore several times. He testified that he had seen appellant, Herman Quirin, with Connley four or five times in Elsinore, and with Bruno three or four times, and had seen Bruno, Connley and Quirin together near Quirin's house while going along the highway.

Further investigation disclosed that a water pipe ran from the hereinabove mentioned mine shaft across the Bruno ranch to a reservoir near the Bruno house, from

which reservoir a buried pipe line lead to the still pit, and according to Chief Barber, a gasoline engine and pump was located some sixty to sixty-five feet down this shaft.

Prohibition Agent Spencer testified that he made an examination of the Bruno ranch and of the still and reservoir and so far as he could find there was no source of water supply for the still other than that which came from the reservoir. [Tr. p. 53.]

He made an investigation of the lumber that was used in the mine shaft and of the lumber that was used in the still pit. In the still pit he found 4x4s, 2x4s, two or three 2x12s, 8x8s, and several 6x6s. In the mine shaft he found some 2x2s, some 4x4s and some timbers that were about the size of, and might have been, 4x4s.

At the trial, N. W. Hotchkiss testified that he was manager of the Dill Lumber Company at Elsinore; was acquainted with the appellants, Connley and Quirin and defendant, Bruno. On a number of occasions up to January 21, 1930, he sold various orders of lumber to Quirin. On January 21, 1930, Connley and Quirin came together to his place of business and purchased an order of lumber. This order was not paid for, but on January 22, 1930, (being the day after the arrest of defendants), the witness saw the lumber piled up on the Bruno ranch and brought it back to the lumber yard. Much of the lumber so purchased at these various times was used in the construction of an addition to the Quirin house on the highway. The witness examined the lumber used in the timbering and roofing of the still and testified that ninety-five per cent of the lumber of the frame work of the pit was not lumber which he had sold to Quirin, but that the

other five per cent of the lumber he saw might have been part of the lumber he sold to Quirin, but that he could not say it was. The only pieces that corresponded in size to lumber he sold to Quirin were 2x12s and approximately twenty pieces of 4x4s.

Richard Kelly, the proprietor of the Kelly Boiler Works, testified that he had an account on his books under the name of P. Walker; that he had only seen Walker, who was a heavy set man, about thirty years old, weighing about two hundred pounds or more, a couple of times; that three or four men ordered material on this account, which was opened when they ordered a 30 H. P. boiler about a year before the trial; that he, Kelly, was present when the tubings were sold for the first boiler, but that he did not remember the appearance of the man to whom he sold it.

The books of the Kelly Boiler Works, introduced through Fred R. Ranney, Kelly's book keeper, contained entries of the account of P. Walker, 916 West 3rd, showing a sale to P. Walker on July 25, 1929, of one 48-inch x8 foot vertical boiler with certain fittings. Another entry showed a sale to P. Walker on August 1, 1929, of two single cylinder pumps. There were various other entries, the last one on December 11, 1929, showing a sale of sixteen 2x6 tubings, one 2-inch tube expander and certain labor, including that of Pete Valero, for repair of boiler, which will be referred to hereafter. According to Prohibition Agent Spencer, he discovered near the still both new and old tubing about two inches in diameter and six feet long.

Kelly further testified that in the month of July, 1929, P. Walker and some other men came to the Kelly Boiler Works and wanted to purchase a 40 H. P. boiler on terms. Kelly, not having one on hand, accompanied them to the Thompson Boiler Works and talked to Russell Thompson about the matter, but Thompson was not willing to let the boiler go on credit. Kelly, seeing that he could not arrange a credit sale, left and the customers thereupon purchased a 40 H. P. Thompson boiler and paid cash therefor. The Thompson employees loaded the boiler on the truck of the purchasers, who thereupon drove away. Kelly's testimony was corroborated by that of Russell Thompson, who further testified that the name "Thompson Boiler Works" appeared on the combustion chamber and the water column of the boiler sold, and identified Government's Exhibit 18 (the boiler set up in the still pit) as a photograph of the boiler sold by him.

Kelly was later recalled, the jury was excused and after being severely grilled by the court in a manner which will be hereafter pointed out in detail, the jury was recalled to the box and the witness stated that the appellant, Connley, looked more like the P. Walker with whom he had done business than any one else in the court room. Whereupon, the court, out of the hearing of the jury, but in the presence of Charles Kruse, another government witness, and an employee of Kelly, directed the marshal to retain Kelly in his custody.

The witness, Charles Kruse, testified he was an employee of the Kelly Boiler Works in January, 1930, and during that month saw appellant, Connley and Nick Bruno at that plant on an occasion when a rush order came to

get out some 2-inch flues, several employees, including Pete Valero and the witness' brother, Albert Kruse, being at the plant. He testified that Connley and Bruno loaded the flues on a truck, and it departed, taking Pete Valero with it.

His identification of Bruno was controverted by the stipulation [Tr. p. 197] to the effect that a man named Bryant, if called to the witness stand on behalf of the defendant, Nick Bruno, would testify that during the entire month of December, 1929, he was with the defendant Bruno; and that Bruno and he, Bryant, were attending Mr. Bruno's goats in Cottonwood Canyon, some ten miles from the Bruno ranch; that Mr. Bruno was there continuously with him, Bryant, during that entire month and did not leave that ranch for any purpose and did not come to Los Angeles for the purpose of visiting the Kelly Boiler Works or for any other purpose, and was further controverted by the testimony of Bruno, who took the stand on his own behalf, and of whose truthfulness the jury bore witness by its verdict. Bruno testified:

> "I never went to a place in Los Angeles called the Kelly Boiler Works. I don't know where it is at, this place. All during the month of December, 1929, I was in Cottonwood Canyon. At that time I had 800 goats, and during the entire month I was there in that canyon. I was in that canyon for six months. I had a fellow in there helping me named Bill Bryant. I am very certain that at no time did I go with anyone to a place called the Kelly Boiler Works. Them months I used to go up and down the hills. We chased all the goats in the canyon, because it was cold, rain and we had a hard time to drive the goats down to the corral. I was living in that little cook wagon. There was no house there, and when

> we find no house we sleep in the cook. In the month of December I did not go to Los Angeles at all. I see that copper utensil that sets in the back of the courtroom there. The first time I saw it was here in the courtroom." [Tr. pp. 218-219.]

Valero testified that on December 11, 1929, he was sent out into the country to do some work, taking fifteen boiler tubes with him, and identified the picture of Bruno's ranch as the place to which he was taken. He descended to the still pit; saw a boiler and several tanks full of some kind of liquid, but did not work on the boiler, as it had a very small man hole and he was too large. He stayed all night in the pit and at six o'clock A. M. was taken back to Los Angeles. He identified Connley as one of the men he had seen in the still pit and stated that that was the first time he had seen him. He did not recognize the driver of the truck on which he was taken to the ranch.

Albert Kruse, an employee of the Kelly Boiler Works for about two years, testified that he was taken to the Bruno ranch after the raid and saw a boiler base which he had helped put together and a boiler similar to one which had been sold by the Kelly Boiler Works. There were no special marks on the boiler, however, and he could not identify it as the one which had been sold. He testified he had seen the man to whom the boiler had been sold in the office of the Kelly Boiler Works two or three times talking with Kelly and the bookkeeper; had seen him walk from his car to the office. He testified that he didn't pay any particular attention and further stated "from the witness stand it appears to me like this man between the two gentlemen in gray," indicating the appellant, Connley.

The Government sought to show that appellant, Quirin, as well as Bruno and Verda, had either helped in the installation of the still, or in planting the fields to grain in order the better to conceal it. In this connection, Fred C. Amsbaw testified that he lived near Elsinore; that he knew Nick Bruno, who had rented a team from him and that on another occasion Bruno came with Quirin to rent a team from the witness; that Bruno said he would stand good for the team and said he had been digging a hole and wanted to level some dirt; that Quirin paid for the team, which was later returned by a boy. This witness testified that he did not see this team at work at any time that he was on the Bruno ranch, but did see that some trees had been dug up at a place where the still was later found to be.

Testimony was introduced by the Government to show, and both Verda and Bruno admitted that for two or three days preceding the arrest of defendant, Bruno and Verda were engaged in planting grain with a grain drill rented from a man by the name of Wagoner. The circumstances under which this work was done, being according to Verda as follows: That he had been employed by one Frank Romero to do farm work on the Bruno ranch and was to receive thirty dollars per month and board, and was taken by Romero to the ranch and given some groceries. The next day Bruno brought a grain drill to the ranch, late in the afternoon. The following two days Bruno and Verda worked at planting grain. On the third day they completed the work and Bruno left with the team and grain drill. That Romero and Connley came to the Bruno ranch Tuesday morning; that a big truck brought some lumber there; that he heard Connley

and Romero discussing the making of a foundation for a tank near the reservoir; that they moved the lumber in and started to work. Whereupon the Federal officers arrived. That Romero was there at the time the officers came and was one of the men who went across the fields and over the hills and escaped. That the only other man that he saw there whom he knew was the defendant, Connley, who gave the officers the name of George Walker. [Tr. p. 201.]

Nick Bruno testified that he was the owner of the ranch known as the Bruno ranch. That he was a goat herder and raised goats and hay on the ranch. That in July, 1929, a man named Romerez, sometimes known as Romero, and two or three men came to his ranch and leased the ranch for a year for a rental of $400.00, stating that they wished to plant alfalfa, to drill a well and install pumps to irrigate it. That after the lease had been signed, he moved away from the ranch and moved his goats to another location. That he did not return to the ranch until about January 18, 1930, when at Romerez's request, he came with a team and grain drill, and together with Verda planted grain, discovering in the course of the last day of planting that the still was there located. That he knew Quirin, who lived near the Perris-Elsinore highway and that Quirin's house had been built about a year and a half before the arrest and that an addition had been built on it within the past four or five months. That before he leased his ranch he had seen the old mine pit but that there was no lumber in it then, and that there was no pipe line on the reservoir on the Bruno ranch.

L. L. Mathews testified that in the latter part of July or the early part of August he had a conversation with Quirin, which conversation took place about three-quarters of a mile west of the Bruno house, Quirin coming to where the witness was looking at a piece of Government land, and asking if the witness had seen an old mule. The witness answered that he had not, and, seeing a pile of dirt down by Bruno's house, asked what they were building down there, to which the defendant Quirin answered they were building a cheese factory down there.

CONTENTIONS OF APPELLANTS.

Appellants contend:

1. That the third count of the indictment does not state facts sufficient to constitute any offense against the United States.

2. That the offenses charged and attempted to be charged in the second, third, fifth and sixth counts of the indictment are component parts of, and necessarily included in, the offense charged in the fourth count of the indictment, and sentences on each of said second, third, fourth and sixth counts, to run consecutively constitute double jeopardy and result in five different punishments for the one inclusive offense.

3. That the court was guilty of misconduct prejudicial to the rights of appellants in its examination of the witness Kelly.

4. That the court erred in refusing to allow counsel for the defendants, or any of them, to interrogate the witness Kelly out of the presence of the jury, after the court had examined him out of the presence of the jury.

5. That the court erred in limiting the cross-examination of the plaintiff's witness, Albert Kruse.

6. That the court erred in admitting in evidence the written statement of the witness Amsbaw, and in commenting on the contents thereof and was guilty of misconduct in its examination of this witness.

7. That the court erred in denying the motion of the appellant Quirin for a directed verdict of not guilty, made at the conclusion of the Government's testimony and renewed after the defendants had rested.

8. That the United States Attorney was guilty of misconduct in his argument to the jury, which misconduct was prejudicial to the rights of appellants.

9. That the court misdirected the jury.

These contentions are based upon the assignment of errors appearing in appendix "D" of this brief and in the transcript of record at pages 270-275.

ARGUMENT.

1. The Third Count of the Indictment Does Not State Facts Sufficient to Constitute Any Offense Against the United States.

The third count of the indictment charges as follows:

> "That the defendants * * * did knowingly, wilfully, unlawfully and feloniously, have in their possession and custody and under their control, one still and distilling apparatus set up at or near the said ranch of Nick Bruno, the legal description of which is as follows, to-wit * * * which said still and distilling apparatus had not been registered by the said defendants with the Collector of Internal Revenue for the Sixth Internal Revenue District of

California, and the said defendants, at the time they did so knowingly, wilfully, unlawfully and feloniously have in their possession and custody and under their control the said still and distilling apparatus, then and there well knew that the said still and distilling apparatus had not been registered with the said Collector of Internal Revenue as required by law. [Tr. p. 7.]

This charge is laid under R. S. Sec. 3258, 26 U. S. C. A. 281, which provides:

> Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the collector of the district in which it is, by subscribing and filing with him duplicate statements, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its cubic contents, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used; one of which statements shall be retained and preserved by the collector, and the other transmitted by him to the Commissioner of Internal Revenue. Stills and distilling apparatus shall be registered immediately upon their being set up. Every still or distilling apparatus not so registered, together with all personal property in the possession or custody, or under the control of such person, and found in the building, or in any yard or inclosure connected with the building in which the same may be set up, shall be forfeited. And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of $500, and shall be fined not less than $100, nor more than $1,000, and imprisoned for not less than one month, nor more than two years. (R. S. 3258.)

This act was derived from the Act of July 20, 1868, Chap. 186, Par. 5, 15 Stat. 126, and the Act of December 24, 1872, Chap. 13, Pars. 1 and 2, 17 Stat. 401-402.

This act was repealed by the National Prohibition Act,

U. S. v. Stafoff, 260 U. S. 477;

67 L. Ed. 358;

U. S. v. Yuginovich, 256 U. S. 450, 65 L. Ed. 1043;

and was reenacted by the Supplemental Act of 1921, 42 Stat. 223, 27 U. S. C. A., Par. 3, as follows:

> All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force on October 28, 1919, shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of this title; but if any act is a violation of any of such laws and also of this title, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. (Nov. 23, 1921, c. 134, Sec. 5, 42 Stat. 223.)
>
> *U. S. v. Stafoff, supra.*

By the Act of March 3, 1927, C. 348, Par. 1, 5 U. S. C. A. 281, it is provided that "there shall be in the department of the Treasury * * * a Bureau to be known as the Bureau of Prohibition * * * the Commissioner of Prohibition shall be at the head of the Bureau of Prohibition * * *."

5 U. S. C. A., Sec. 281 C, is as follows:

> The rights, privileges, powers, and duties conferred or imposed upon the Commissioner of Internal Revenue and his assistants, agents, and inspectors, by any law in respect of the taxation, importation, exportation, transportation, manufacture, production, compounding, sale, exchange, dispensing, giving away, possession, or use of beverages, intoxicating liquors, or narcotic drugs, or by Title 27, or any other law relating to the enforcement of the eighteenth amendment, are hereby transferred to, and

conferred and imposed upon, the Secretary of the Treasury.

> The Secretary of the Treasury is authorized to confer or impose any of such rights, privileges, powers, and duties upon the Commissioner of Prohibition, or any of the officers or employees of the Bureau of Prohibition, and to confer or impose upon the Commissioner of Internal Revenue, or any of the officers or employees of the Bureau of Internal Revenue, any of such rights, privileges, powers, and duties which, in the opinion of the Secretary, may be necessary in connection with internal revenue taxes. (Mar. 3, 1927, c. 348, Sec. 4, 44 Stat. 1382.)

Article 18 of Regulation 3 promulgated by the Secretary of the Treasury on October 1, 1927, requires:

> Proprietors * * * distillers or all others who set up stills to register them with the Prohibition Administrator.

It will be seen that the effect of the Reorganization Act (5 U. S. C. A. 281 and 281 c) *supra,* was to impose upon the Secretary of the Treasury and the officers whom he should designate, the duty of accepting the registration of stills theretofore by 26 U. S. C. A. 281 imposed upon the Collector of Internal Revenue.

In consequence, as, after the passage of the Reorganization Act, it was no longer required that one in the possession, custody or control of a still which had been set up, register it with the Collector of Internal Revenue, a failure so to register such a still is no offense and an indictment charging such a failure and not charging a failure to register such a still with the Prohibition Administrator states no offense.

U. S. v. Dibella, 28 Fed. (2nd) 805 (C. C. A. 2nd);
U. S. v. Lecato, 29 Fed. (2nd) 694 (C. C. A. 2nd).

The court in the Lecato case stating:

> The indictment was in six counts, of which the first three charged the defendants with having in their possession a still not registered with the Collector of Internal Revenue, one count covering each of three separate stills. * * * Revised Statutes, 3258 (26 U. S. C. A. 281), is still in force, but by section 281c (5 U. S. C. A.) of the Prohibition "Reorganization Act" the duties imposed by it upon collectors have devolved upon the Secretary of the Treasury, who may distribute them as he thinks fit. By article 18 of Prohibition Regulation 3, the Secretary has imposed them upon prohibition administrators. It is therefore no longer a crime to possess a still not registered with the collector of the district, if it be properly registered with the administrator.

The rule laid down in the Lecato case was approved and followed by this court in

Silva v. U. S., 35 Fed. (2nd) 598.

2. The Offenses Charged and Attempted to Be Charged in the Second, Third, Fifth and Sixth Counts of the Indictment Are Component Parts of and Necessarily Included in the Offense Charged in the Fourth Count of the Indictment, and Sentences on Each of Said Second, Third, Fourth and Sixth Counts, to Run Consecutively, Constitute Double Jeopardy and Result in Five Different Punishments for the One Inclusive Offense.

The second count of the indictment charges that the defendants

> "on or about the 20th day of January, A. D. 1930, at the ranch of Nick Bruno * * * did knowingly, wilfully, unlawfully and feloniously manufacture for beverage purposes about thirteen hundred (1300) gallons of intoxicating liquor, the exact amount be-

ing to the grand jurors unknown, then and there containing alcohol in excess of one-half of one per cent by volume, in violation of section 3, Title II of the National Prohibition Act of October 28th, 1919, as amended March 2nd, 1929." [Tr. p. 6.]

The third count of the indictment charges:

"that the defendants on or about the 21st day of January, A. D. 1930, at the ranch of Nick Bruno did knowingly, wilfully, unlawfully and feloniously have in their possession and custody and under their control, one still and distilling apparatus set up at or near the said ranch of Nick Bruno, the legal description of which is as follows, to-wit * * * which said still and distilling apparatus had not been registered by the said defendants with the Collector of Internal Revenue for the Sixth Internal Revenue District of California, and the said defendants, at the time they did so knowingly, wilfully, unlawfully and feloniously have in their possession and custody and under their control the said still and distilling apparatus, then and there well knew that the said still and distilling apparatus had not been registered with the said Collector of Internal Revenue as required by law. [Tr. p. 7.]

The fourth count of the indictment charges that the defendants

"on or about the 21st day of January, A. D. 1930, at the ranch of Nick Bruno * * * did knowingly, wilfully, unlawfully and feloniously engage in and carry on the business of distillers without having given bond, as required by law, with the intent on the part of them, the said defendants, to defraud the United States of America of the tax on the spirits distilled by them, the said defendants, in violation of section 3281, United States Revised Statutes." [Tr. p. 8.]

The fifth count of the indictment charges that the defendants

> "on or about the 21st day of January, A. D. 1930, * * * did knowingly, wilfully, unlawfully and feloniously make and ferment on certain premises other than a distillery, and in a certain building other than a distillery duly authorized accordingly to law, to-wit: on the ranch of Nick Bruno * * * about fifty thousand (50,000) gallons of mash, which said mash was then and there fit for distillation and for the production of spirits, and which said mash was not then and there intended to be used in the manufacture of vinegar exclusively or at all; in violation of section 3282, United States Revised Statutes." [Tr. p. 9.]

The sixth count of the indictment charges that the defendants

> "on or about the 21st day of January, A. D. 1930, at the ranch of Nick Bruno * * * did knowingly, wilfully and unlawfully have in their possession about thirteen hundred (1300) gallons of intoxicating liquor, then and there containing alcohol in excess of one-half of one per cent by volume, for beverage purposes; in violation of section 3, Title II, of the National Prohibition Act of October 28, 1919." [Tr. p. 10.]

The appellants having been convicted and sentenced under the fourth count of the indictment, which charges that they unlawfully engaged in and carried on the business of distillers without having given bond as required by law, were thereby convicted of and sentenced for each act necessarily included within the definition of that offense.

In the case of *Ex Parte Nielsen,* 131 U. S. 176, 33 L. Ed. 118, two indictments were found against the peti-

tioner on the same day. The first charged that on the 15th of October, 1885, and continuously from that time till the 13th of May, 1888, in the territory of Utah, he, the said Nielsen did unlawfully claim, live and cohabit with more than one woman as his wives. To this indictment Nielsen pleaded guilty and was sentenced to imprisonment in the penitentiary and the payment of a fine.

The second indictment charged that said Nielsen on the 14th of May, 1888, at the same place, did unlawfully and feloniously commit adultery with one Caroline Nielsen, he being a married man and having a lawful wife and not being married to said Caroline. The said Caroline Nielsen was one of those women named in the first indictment. After suffering the penalty imposed by the sentence for unlawful cohabitation, the indictment for adultery came on for trial on Nielsen's plea of not guilty and former conviction by reason of his conviction for unlawful cohabitation.

To this plea of former conviction the district attorney demurred, the demurrer was sustained and the petitioner was convicted on his plea of not guilty. He thereupon petitioned the District Court for a writ of habeas corpus, which was refused. The appeal was from the order refusing that writ.

The court held that the adultery charged in the second indictment was an incident to and a part of the unlawful cohabitation charged in the first indictment. That cohabitation meant living together as man and wife, which included sexual intercourse, and this was the integral part of the adultery charged in the second indictment and was covered by, and included in, the first indictment and conviction. The court saying:

> "The conviction on that indictment was in law a conviction of a crime which was continuous, extending over the whole period including the time when the adultery was alleged to have been committed. The petitioner's sentence and the punishment he underwent on the first indictment was for that entire continuous crime. It included the adultery charged. To convict and punish him for that also was a second conviction and punishment for the same offense."

In the case at bar the offense of unlawfully engaging in and carrying on the business of distillers without having given bond as required by law is a continuing offense. In order to determine whether or not the offenses charged in the second, third, fifth and sixth counts are incident to and necessarily included in this offense, it is necessary to determine what the business of a distiller is.

Section 3247, R. S. (26 U. S. C. A. #241), provides:

> "Every person who produces distilled spirits, or who brews or makes mash, wort, or wash, fit for distillation or for the production of spirits, or who, by any process of evaporization separates alcoholic spirit from any fermented substance, or who, making or keeping mash, wort, or wash, has also in his possession or use a still, shall be regarded as a distiller."

In other words, every person who does the acts charged in counts 2, 3, 5 and 6, is by this statute declared to be a distiller.

In *Motlow v. U. S.*, 35 F. (2nd) 90, (C. C. A., 8th), the court held that a distilling company which had ceased the manufacture of liquor but which still maintained its warehouse, in which it stored and out of which it sold liquor formerly manufactured by it was still carrying on the business of a distiller, saying:

> "It goes without saying that warehousing and selling of whiskey is as much a part of a distiller's business as is the actual production of whiskey, and the question naturally arises, if the company was not a distiller during the period it was holding this whiskey in the warehouse, after it had ceased distilling, in what capacity was it holding the whiskey?"

The business of a distiller is to distill intoxicating liquor, which cannot be done without both possessing a still and fermenting mash to distill therein; neither can such a business be conducted without possessing the liquor after it has been so distilled.

It follows as a necessary result of the doctrine of the Nielsen case, *supra,* that appellant Connley having been convicted for the continuing offense, of "engaging in the business of distillers" and sentenced therefor, was by that conviction and that sentence, convicted and sentenced as for every act necessary to constitute that offense.

In *Tritico v. United States,* 4 Fed. (2d) 664 (C. C. A. 5th) in an indictment in three counts for violation of the National Prohibition Act, the defendants were charged, in the first count with the unlawful possession of intoxicating liquor, in the second with the unlawful possession of property designed for the manufacture of liquor, and in the third count with the unlawful manufacture of liquor. Defendants were convicted on all counts. A general sentence without reference to counts imposed a greater punishment than the law authorized as for any one count. Considering the contention of appellant that the sentence imposed constituted double jeopardy the court quoted from the Nielsen case, *supra,* saying:

"In the Nielsen case * * * it is said: 'Where, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.'

'Applying this well-established rule to the indictment in this case, it must be apparent at once that proof of possession of distillery apparatus would necessarily have to be included in order to prove the manufacture of liquor, because such manufacture would otherwise be impossible. Likewise the same evidence which proved manufacture of liquor proved possession of it, because, upon the manufacture being completed, the liquor necessarily came into the control or possession of the manufacturer. It can make no difference whether separate charges are tried together or at different times. If the defendants had been tried for manufacturing liquor, thy could not afterwards have been prosecuted for possessing the apparatus necessary for such manufacture or for possessing the liquor so manufactured. It is true that evidence of possession of apparatus would not be required to prove possession of liquor, and vice versa, so that convictions could be had upon both the first and second counts. It is likewise true that a conviction under either the first or second count would not prevent a conviction under the third count, because proof of manufacture requires additional evidence. But these results do not militate against the conclusion that a conviction under the third count for manufacture would bar a prosecution under the first or the second count for unlawful possession of apparatus or liquor. Reynolds v. United States (C. C. A.) 280 F. 1; Morgan v. United States (C. C. A.) 294 F. 82. The conclusion is that the sentence is excessive.' "

To the same effect is:

Goetz v. United States, 39 Fed. (2d) 903, (C. C. A. 5th).

In *Cain v. United States,* 19 Fed. (2d) 472 (C. C. A. 8th), the indictment was in two counts, one charging the unlawful sale of morphine, the other the unlawful sending of morphine through the mail. The evidence showed a sale by the defendant and a delivery by mail. On appeal, the court held that but one offense had been committed and that a delivery is a necessary element of a sale, and that inasmuch as the delivery was necessarily included in the sale, a sentence on both counts constituted double jeopardy.

In *Miller v. United States,* 300 Fed. 529, 534 (C. C. A. 6th) it was held that on a charge of sale and possession of intoxicating liquor where the only possession was that shown by the act of sale, the offense of possession was necessarily included in and merged in the offense of sale. See also:

People v. Painetti, 80 Cal. Dec. 21;
United States v. Buckner, 37 Fed. (2d) 378;
Brady v. United States, 24 Fed. (2d) 399;
United States v. Weiss, 293 Fed. 992;
Murphy v. United States, 285 Fed. 801;
Braden v. United States, 270 Fed. 441;
16 *Corpus Juris,* 264.

The appellants respectfully contend that the acts charged in the second, third, fifth and sixth counts, when taken together constitute the offense charged in the fourth count and therefore merge therein.

3. The Court Was Guilty of Misconduct Prejudicial to the Rights of Appellants in Its Examination of the Witness Kelly.

On March 19, 1930, Richard Kelly was called as a witness for the Government. He was examined, excused and on March 25th, 1930, recalled by the Government. The substance and manner of his examination and the attitude of the court throughout it were, in the opinion of counsel, so prejudicial that we have appended to this brief, marked "Appendix A," all of those portions of the record bearing upon it.

We set this testimony out largely by question and answer, rather than in narrative form, both in our bill of exceptions and in our brief, because it seemed to us to be the only way in which the attitude of the trial judge could be made plain to this Honorable Court.

It seems scarcely possible that the Government will contend that the court did not commit grave error in the relentless, merciless and savage grilling of this old man, as disclosed by the record set out in Appendix A.

The court began its inquisition by the ominous admonition to the witness "to get his memory in shape to identify that man if he is in the court room," followed it by the statement that the witness was "bound to come through if it is possible," and ended this anomolous proceeding by an order for the arrest of the witness [Tr. pp. 28, 29 and 107] apparently for the reason that the witness had only partially yielded to the terrorism inspired by the court.

The only ground on which any party is ever permitted to cross-examine his own witness is on the ground of surprise, when that witness has given testimony contrary to

that expected by and adverse to the interests of the party producing him, and it is only after the laying of a proper foundation showing such surprise that such cross-examination is permitted.

> *Sullivan v. United States,* 28 F. (2d) 147 (C. C. A. 9th).

And it necessarily follows that what the prosecuting attorney may not do, the court may not do for him. Indeed the court is more strictly limited than is the prosecuting officer for, as was said in *Adler v. United States,* 182 Fed. 464 (C. C. A. 5):

> "A cross-examination that would be unobjectionable when conducted by the prosecuting attorney might unduly prejudice the defendant when it is conducted by the trial judge."

There was no showing that the Government was surprised by the testimony of its witness, Kelly, the United States attorney merely making the meager statement that he was "somewhat surprised with the testimony given by the witness in some respects" immediately preceding his so-called "continued direct testimony." [Tr. p. 87.]

In the case of *Sullivan v. United States, Supra,* this court said:

> "* * * In any event a party cannot claim to be surprised by the testimony of a witness, when he has failed to make inquiry as to what the testimony will be before calling the witness to the stand."

The record fails to show that the prosecuting attorney ever asked Kelly, before he was called to the witness stand, if he could identify Connley as the man with whom he had done business.

We respectfully ask this court to note that although the whole purpose and object of the court's examination was to impel an identification of Connley as the person with whom Kelly had dealt, the first time Mr. Kelly was called to the stand by the Government he was not asked whether he could or could not identify Connley as that man.

Can one be surprised by an answer he has not had?

The omission to ask Kelly, upon his first appearance upon the stand, if he could identify Connley, can only have resulted from an oversight on the part of counsel for the Government, or from a fear that if the question were asked the witness would state he could not do so. Either reason negatives surprise.

Moreover, whatever may have been the situation at the time the United States attorney announced he was "somewhat surprised," surely he was not still suffering from surprise six days later when Kelly was recalled to the stand, particularly in view of the fact that Kelly's testimony had, in the interim, been in large part corroborated by that of Government's witness, Thompson [Tr. pp. 137, 139, 142, 143, 144, 145] and the testimony of Fred R. Ranney. [Tr. pp. 175, 177.]

Even upon his recalling of Kelly to the witness stand, he did not ask Kelly whether or not he could identify Connley and thereafter cross-examine upon such answer as he might give. On the contrary, both court and counsel *assumed* he would testify that he could not make such identification, and the effort of court and counsel was clearly directed to the end of forcing an identification rather than to the lawful end, in a proper case, of re-

lieving the government of the burden imposed upon it by a witness who had testified differently than he had led the Government to expect.

Appellants feel that it is needless for counsel to dwell upon the dangers of testimony extorted by what proved to be the well justified fear of imprisonment on the part of Kelly. It had been their belief, until confronted by the facts of this case, that extorting of testimony by fear of, or by actual imprisonment, had been, for universally accepted reasons of public policy, discarded following the close of the middle ages.

If it be admitted that a judge—because he conceives that a witness knows more than he is telling, or fears that the answer to a question involving identification, may not result in the pointing out of the defendant,—may excuse the jury and wring reluctant, uncertain and "tentative" [Tr. p. 97] identification from a witness frightened by the statements of the court, the striking by the judge of the bench with his fist, and the sarcastic admonitions, to defendants' counsel, to get a moving picture machine to record the judge's actions and attitude [Tr. p. 95], of what practical value is defendant's constitutional right to be confronted by the witnesses against him? No one will, we feel, assert that a judge would have power to bar the testimony of an otherwise competent witness because, for reasons best known to the court, he did not fancy his testimony. Yet we can perceive no difference in principle between such an act and the power which the court here assumed. This assumed power was particularly dangerous, directed, as it was in the case at bar, at a man sixty-eight years of age who had just arisen from a sick bed. [Tr. p. 81.]

Counsel have diligently searched to find a similar case dealt with by our courts, but the departure in this case from any recorded instance of court procedure is so wide that this precise situation seems never to have been passed upon by reviewing courts.

A situation, differing upon the facts, but similar in principle, was considered by the Circuit Court for the Eighth Circuit in *Glover v. United States,* 147 Fed. 426, in which the court said:

> "To further illustrate the spirit of dealing with the defendant's witnesses, when the witness Solomon was on the stand, who had testified very positively as to the place where he saw the defendant on or about the time of the alleged robbery, and whose testimony, if unimpeached, was of the highest value, to the defendant, the court, as if to break the force of his testimony, took the witness in hand and catechised him as follows:
>
> 'Solomon, the court asks you whether you are absolutely sure and certain that this defendant was there at the school celebration on the 27th; if you are mistaken you can correct your statement yet, but if you are absolutely certain say so; but think a moment and see whether or not you are mistaken about it. If you are mistaken correct your statement; if you are not, why just say it out. Perhaps you might be mistaken; the court doesn't know; but the court wants to have you remember everything properly and truthfully, and if there is any doubt in your mind, make your correction; if there is any doubt in your mind that this defendant was not there; men sometimes are mistaken; just think about it and deliberate about it, and correct your statement if you are mistaken.'
>
> This bears on its face its own comment."

A situation more clearly resembling the one in the case at bar is found in the case of *Adler v. United States, supra.* The court saying:

"The record showed that the trial judge cross-examined the defendant's witnesses at length, his cross-examinations supplementing the cross-examinations of the district attorney and the special counsel for the Government, and in some instances exceeding theirs in length. These examinations by the judge were critical and apparently hostile to the witnesses. They led to many objections by defendant's attorneys and to spirited controversies between the attorneys and the judge."

After setting forth some of the questions propounded by the court and some of the controversies between the trial court and counsel, the court said:

"The trial judge, under the federal system, is not only permitted, but it is his duty, to participate directly in the trial, and to facilitate its orderly progress and clear the path of petty obstructions. It is his duty to shorten unimportant preliminaries, and to discourage dilatory tactics of counsel. The purpose of the trial is to arrive at the truth, and without unnecessary waste of time. In performing his duties, it may become necessary to shorten the examination of witnesses by counsel, and there is no reason why the judge should not propound questions to witnesses when it becomes essential to the development of the facts of the case. This is a matter within the discretion of the court, with which we would be reluctant to interfere. But the conduct of the judge, in the performance of all his duties, should appear to be impartial. The impartiality of the judge—his avoidance of the appearance of becoming the advocate of either one side or the other of the pending controversy which is required by the conflict of the evidence to be finally submitted to the jury—is a fundamental and essential rule of especial importance in criminal cases. The importance and power of his office, and the theory and rule requiring impartial conduct on his part, make his slightest action of great weight with the jury. While we are of opinion that the judge is permitted to take part impartially in the examination or cross-

examination of witnesses, we can readily see that, if he takes upon himself the burden of the cross-examination of defendant's witnesses, when the government is represented by competent attorneys, and conducts the examination in a manner hostile to the defendant and the witnesses, the impression would probably be produced on the minds of the jury that the judge was of the fixed opinion that the defendant was guilty and should be convicted. This would not be fair to the defendant, for he is entitled to the benefit of the presumption of innocence by both judge and jury till his guilt is proved. If the jury is inadvertently led to believe that the judge does not regard that presumption, they may also disregard it.

A cross-examination that would be unobjectionable when conducted by the prosecuting attorney might unduly prejudice the defendant when it is conducted by the trial judge. Besides, the defendant's counsel is placed at a disadvantage, as they might hesitate to make objections and reserve exceptions to the judge's examination, because, if they make objections, unlike the effect of their objections to questions by opposing counsel, it will appear to the jury that there is direct conflict between them and the court. If it were the function of the judge in this country, as it is in some foreign tribunals, to perform the duties incumbent here on the district attorney, the impression produced on the minds of the jury against the defendant would not be so inevitable. Counsel are expected to maintain an attitude of respect and deference toward the judge, and this attitude is maintained without difficulty when the judge confines his activities to the usual judicial duties. And the judge can more easily treat counsel with the respect due an officer of the court in the performance of a duty, if he avoids the performance of the duties incumbent properly upon an attorney representing one side of the case. The evidence, taken as a whole, might be so conclusive of the defendant's guilt that an appellate court would not be justified in interfering with the judgment on this account alone. But in a case where there is substantial

> conflict in the evidence as to the essential points that were required to be submitted to the jury, the course of the judge in unnecessarily assuming to perform the duties incumbent primarily upon others might make it the duty of an appellate court, on this ground alone, to grant a new trial."

We submit, moreover, that the soundness of the proposition that grave error compelling a reversal of this case necessarily resulted from the court's action is apparent upon broad considerations of reason and justice. The solicitude with which the law has always protected even a guilty person from the effect of confessions obtained through fear or hope of reward, evidences the fact that the law abhors the use of force or fear. In *Fitter v. United States,* 258 Fed. 567 (C. C. A. 2d) it is said:

> "The rule in regard to the admission of confessions is stated by the Supreme Court in Bram v. United States, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568, as follows:
>
> "But a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.
>
> "A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted. * * * "

Sound public policy in our view demands like protection for a witness and would forbid the doing to a defendant through another that which the law would forbid if attempted to be done directly to him.

Indeed the action of the assistant United States attorney trying the case, in declining to ask the witness Kelly any questions in the presence of the jury following this strange interlude leads us to believe that he recognized the utter impropriety of the attempt of the court to force an identification from the Government's witness Kelly [Tr. p. 105] and the remarks of the trial judge when confronted with this attitude on the part of Government's counsel that, "The court will accept that responsibility, gentlemen, with pleasure, as a matter of necessity," and the conduct of the ensuing examination in a manner hostile to the defendant and the witness must have impressed upon the minds of the jurors that in the language of the Adler case, *supra*, "the judge was of the fixed opinion that the defendants were guilty and should be convicted."

In view of this failure of the prosecuting attorney to accept the court's invitation to bring before the jury, the fruit of its grilling it would seem a more likely and a more consistent position for the Government upon this appeal to advance the theory that, admitting that the "tentative" identification of Connley wrung from the witness Kelly, was improper, yet he was nevertheless identified as the man with whom Kelly dealt by the witnesses Albert Kruse and Charles Kruse and that, therefore, misconduct of the trial court in relation to the witness Kelly should not result in reversal.

Anticipating this contention, we respectfully direct the attention of the court to the fact that during the testimony of the said Albert Kruse (who was an employee of Mr. Kelly), and before Kruse had been asked to identify "tentatively" or otherwise, appellant, Connley, the

statements of the assistant United States attorney and of the court as to their dissatisfaction with the testimony of Mr. Kelly, and their intention to recall him and make their dissatisfaction plain, had been made in the presence of this witness. [Tr. pp. 184, 186.]

We respectfully submit that the effect of such statements made over appellant's objection, must of necessity have impressed upon the witness Albert Kruse that the safest thing for him to do was to testify in accordance with the apparent wishes of the court.

In *Rutherford v. United States*, 258 Fed. 855 (C. C. A. 2) the court said:

> "We think that the attitude of the court in regard to the testimony of these three witnesses and the action it took in the presence of the jury in the case of the witness William F. Hudgings was most prejudicial to the defendants. It was very likely to intimidate witnesses subsequently called, to prejudice the jurors against the defendants, and to make them think that the court was satisfied of the defendants' guilt. What a judge may say to the contrary on such an occasion will not necessarily prevent such consequences. It is not enough to justify a conviction that the defendant be guilty. He has a right to be tried in accordance with the rules of law. The defendants in this case did not have the temperate and impartial trial to which they were entitled, and for that reason the judgment is reversed."

That the grilling of the witness Kelly, and his subsequent arrest upon the adjournment of court, had like effect upon the witness, Charles Kruse, another employee of Kelly, and a brother of Albert Kruse, can hardly be doubted in view of the fact that he was sitting in the court room during the second examination of witness

Kelly. [Tr. p. 193.] The effect of the proceedings upon him is apparent from the fact that in his seeming eagerness to please, he swore positively that the defendant Bruno was the man who drove the truck to the Kelly Boiler Works and took Perfecto Valero away with him. [Tr. p. 192.] This identification of Bruno was controverted by the testimony of Bruno [Tr. p. 218], by that of Perfecto Valero [Tr. pp. 178, 179], and by the stipulation entered into between counsel for defendants and the Government:

> "That a man named Bryant, if called to the witness stand on behalf of the defendant Nick Bruno, would testify that during the entire month of December, 1929, he was with the defendant Bruno and that Bruno and he, Bryant, were attending Mr. Bruno's goats in Cottonwood Canyon some ten miles from the Bruno ranch; that Mr. Bruno was there continuously with him, Bryant, during the entire month and did not leave that ranch for any purpose, and did not come to Los Angeles for the purpose of visiting the Kelly Boiler Works or for any other purpose." [Tr. p. 197.]

We believe it indeed significant that Perfecto Valero, the only witness who identified the defendant Connley prior to the time the court indicated his dissatisfaction with the prior testimony of Mr. Kelly, testified that the first time he had seen defendant Connley was when he saw him at the still on the Bruno ranch [Tr. p. 179] and this despite the fact that Charles Kruse testified that this witness Valero was present at the Kelly Boiler Works at the time the man whom he, Kruse, identified as Connley was there and purchased the boiler tubings which Valero took to the ranch. [Tr. pp. 191, 192.]

That the question of whether or not Connley was present at the Kelly Boiler Works and negotiated for the purchase of the boiler thereafter found at the still on the Bruno ranch was of tremendous importance as a fact in the case cannot be gainsaid; that the only persons who testified to his presence at the Kelly Boiler Works did so after having come in contact with the actions and attitude of the trial judge with respect to the witness Kelly, can likewise not be gainsaid; and we respectfully submit that it is apparent that the court's action in intimidating and arresting Kelly likewise intimidated his two employees, and must have so affected their testimony as to result in prejudicial error for which reversal should properly be had.

Moreover, the aggregate effect of the manner and attitude of the court cannot but have had an effect upon the jury most prejudicial to defendants. If we approach the record of this trial from the viewpoint that the witness Kelly was an honest man, honestly trying to testify to that which he remembered, but only to that—an assumption which we have the right to make, in the absence of proof to the contrary, since he was a witness produced by the Government and vouched for by reason of that production—his testimony with reference to the presence of Connley at the Kelly Boiler Works did not amount to an identification of Connley. His testimony was:

> "Q. Tell the jury whether you see in the courtroom a man who resembles this P. Walker with whom you had these transactions. A. I am telling the jury I looked at the people around the jury there.
>
> The Court: Around the courtroom you mean.
>
> The Witness: Around the courtroom yes, and I only see one that I would say resembled this

man that went by the name of Mr. Walker. I wouldn't say that was him for sure, but—

The Court: Which man is it?

The Witness: This man sitting over there with a red necktie (indicating Connley)." [Tr. pp. 106-107.]

If nothing is read into the statement of the witness Kelly other than that which he in fact said, he did not identify Connley as the man with whom he had the transactions, but said simply that he was the only man he saw in the courtroom that resembled him, and was interrupted by the court, and was seemingly prevented from further qualifying even this "tentative" identification. That each of us daily see persons who resemble other persons of our acquaintance and yet whom we know to a certainty are not the persons whom they so resemble, is a commonplace. Yet the attitude of the court was such that the testimony of Kelly did not so reach the jury.

The sending of the jury from the box; the inquisitorial attitude of the court; the impatient and belittling attitude of the court towards what we believe were the proper objecions interposed by counsel, all had the effect of conveying to the minds of the jurors the fact that the court believed—and no jury would, we think, do other than feel that the court must have had ample private reasons for its manifest belief—that Connley was the man who had dealt with Kelly, and that the witness Kelly was deliberately seeking to avoid an identification of him. No man, however innocent, could escape from being identified, in the mind of the jury, as a wrongdoer under such circumstances, for a half identification apparently extracted by the court from an uncertain witness is as damaging to a person

whose identification is sought as a positive identification could be. We would ask that the Government point out in its brief one single fact testified to by Kelly, which was shown by any testimony in the record to be untrue. We ask this because, as we read the record, in so far as the events to which Kelly testified were referred to by the other witnesses produced by the Government, they corroborated and made manifest the truth of his testimony, and we submit that the entire record of Kelly's testimony shows that, considering his age and physical condition, his memory of the transactions concerning which he was interrogated, was as clear as could reasonably be expected.

Reducing it to its simplest terms, the attitude of the trial judge, and his manner of cross-examining Kelly resulted in the distortion of Kelly's failure to identify Connley into what was as damaging as a positive identification would have been.

Without the identification of Kelly and that of the Kruse brothers, which identifications were tainted by the same vice as was Kelly's, the record as to Connley would simply have shown that according to the testimony of Valero, Connley and another man were in the still pit on December 11, 1929, at the time Valero arrived there, Valero testifying:

> "When I got out to where the still was located, there were two men down below. They were the ones who were waiting there to fix the boiler. These two men were two men other than the one who took me out. One of them was quite stout, about five feet six inches tall, and would weight about two hundred pounds. I don't remember the other fellow. *I couldn't see very well.* (Italics ours.) * * * I first saw this man there at the still; he was there." [Tr. p. 179.]

And that Connley was found in the house on the Bruno ranch at the time of the arrest, under the circumstances hereinbefore set out.

What the verdict might have been as to Connley as to all or each count in the indictment, had the evidence as it went to the jury disclosed these facts alone, can only be a matter of speculation.

A comparison of such a record with that which actually went to the jury makes manifest the prejudice which resulted from the action and attitude of the court.

In the case of *People v. Mahoney,* 201 Cal. 618, 258 Pac. 607, a prosecution for manslaughter alleged to have been committed by the negligent construction of a grandstand which fell, killing a woman sitting thereon, the court said:

> "We deem it unnecessary to review the nearly two thousand pages of testimony taken in the court below. It suffices to say that there is evidence from which the jury might well conclude that the grandstand which collapsed was so negligently constructed as to be unable to carry the tremendous load placed upon it. * * *
>
> The remaining two points urged by appellant as reasons for the reversal of the judgment may properly be considered under one head. They consist of twenty-three utterances by the trial judge and numerous instances where he took to himself the task of examining witnesses, which appellant says conveyed to the mind of the jury the impression that the judge was convinced of the guilt of the defendant and that his sympathy was wholly with the prosecution."

After stating a number of such remarks by the trial judge, the court said:

"We have presented sufficient to show a state of affairs which trial judges should not permit and which may be pointed to as an example of what they should not do in the trial of lawsuits. If they will lend themselves to such methods, if they will so intemperately espouse the cause of the prosecution in criminal cases, no man charged with a penal offense is safe, whether he be guilty or innocent. Every defendant under such a charge is entitled to a fair trial on the facts and not a trial on the temper or whimsies of the judge who sits in his case. Whatever the degree of guilt of appellant here, those who know the circumstances surrounding his conviction are likely to feel that the verdict resulted from the conduct of the judge and not from the evidence.

The prosecution attempts to justify the remarks of the trial court upon the ground that, because there was sufficient evidence of the negligent and faulty construction of the grandstand to support the finding of the guilt of the defendant, they were 'harmless,' made in a 'facetious light,' and that the court was 'indulging in a bit of humor.' It also invokes the curative provisions of section 4½ of article VI of the constitution. Such an attitude on the part of a trial court as that here disclosed cannot be passed over so lightly. Jurors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials. For this reason, and too strong emphasis cannot be laid on the admonition, a judge should be careful not to throw the weight of his judicial position into a case, either for or against the defendant. It is unnecessary to cite the cases bearing on this subject. It is a fundamental principle underlying our jurisprudence. When, as in this case, the trial court persists in making discourteous and disparaging remarks to a defendant's counsel and witnesses and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge, and in other ways discredits the cause of the defense, it has transcended so far beyond the pale of

judicial fairness as to render a new trial necessary. Neither can a plea for the application of the section of the constitution save this situation. The fact that a record shows a defendant to be guilty of a crime does not necessarily determine that there has been no miscarriage of justice. In this case the defendant did not have the fair trial guaranteed to him by law and the constitution.

The judgment of conviction is reversed and a new trial ordered."

Section 4½ of article 6 of the California Constitution above referred to, is as follows:

"HARMLESS ERRORS TO BE DISREGARDED.

"Sec. 4½. No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. (Amendment adopted November 3, 1914.)"

4. That the Court Erred in Refusing to Allow Counsel for the Defendants, or Any of Them, to Interrogate the Witness Kelly Out of the Presence of the Jury, After the Court Had Questioned Such Witness Out of the Presence of the Jury.

An examination of the record shows that the court refused to permit counsel for defendants to examine the witness Kelly out of the presence of the jury after the court had examined him out of the presence of the jury. [Tr. p. 103]:

"Mr. Belt: Now, Mr. Kelly, isn't it a fact that the only way that the defendant which you have

pointed out here resembles the man that called at your place of business is from the fact that he is portly, heavy set, in other words? A. Yes.

Mr. Ohannesian: Now, may it please the court, at this period I don't understand that there is any cross-examination necessary, because this is a matter outside of the trial of the case, and has not bearing upon the trial of the case, and it is also understood—

The Court: Yes.

Mr. Ohannesian: (Continuing) —that it is in the absence of the jury, and is not a part of the record.

Mr. Belt: Do I understand—

Mr. Ohannesian: Just a minute.

Mr. Belt: I beg your pardon.

Mr. Ohannesian: At this time I want the record to show that all that has transpired since the absence of the jury is not a part of the record, and as such will not be made a part of the record.

Mr. Belt: To which we object.

The Court: The record will show that this has been done in the absence of the jury.

Mr. Ohannesian: And not a part of the case.

The Court: And not a part of the case, so far as the jury has the case.

Mr. Herron: And the objections of the defendant are that they are foreclosed the opportunity of examining the man along the same line that counsel is examining him. May the record so show?

The Court: You have enough, gentlemen. You have got your record preserved.

Mr. Herron: If the court please—

The Court: You will have your opportunity of examining.

Mr. Herron: We ask, if the court please, that we be given an opportunity to examine out of the presence of the jury, and take an exception with respect to the refusal so to permit us.

(At this point the jury returned to the court-room.)"

While counsel, as they have pointed out in point 3 of this brief, have been unable to find any authority for the mode of examining witnesses out of the presence of the jury employed by the court in the case at bar, we nevertheless feel that every reason of justice would dictate that if the court, who in the instant case was during the examination acting as the prosecutor, should be permitted such examination, attorneys for the defendant should be permitted to at least exercise the right of cross-examination under the same circumstances.

The error of the court in this regard additionally emphasizes the court's manifest unfairness.

5. The Court Erred in Limiting the Cross-Examination of Plaintiff's Witness, Albert Kruse.

Albert Kruse, a witness called on behalf of the Government, testified in part upon direct examination that a heavy, fleshy man about 30 or 35 years of age came to see Mr. Kelly [Tr. p. 183] and talked to Mr. Kelly in the presence of the witness concerning a boiler base. The jury was excused and after the conversation between the court and the Assistant United States Attorney, set forth in appendix "A" and at Tr. pp. 184, 187, the jury returned to the box and the witness stated, that he had seen the man whom he had previously mentioned at the Kelly Boiler Works two or three times but "didn't pay any particular attention" and stated: "From the witness stand it appears to me like this man between the two gentlemen in gray (indicating the defendant Connley)." [Tr. p. 187.]

On cross-examination the following took place:

"By Mr. Belt:

The Witness: I have testified that I overheard several conversations between the gentleman that was directing the erection of the base to Mr. Kelly. He didn't have either a high tenor or deep bass voice, but just ordinarily speaking, I think his voice was something like mine, not quite as hoarse as mine is.

Mr. Belt: Did he have an impediment in his speech?

Mr. Ohannesian: Just a minute. We object to that as not proper cross-examination of this witness, Your Honor.

The Court: Well, it is cross-examination on identification.

Mr. Ohannesian: We didn't go into the question of his voice.

The Court: Wait a minute. I sustain the objection.

Mr. Belt: Exception." [Tr. p. 188.]

That a witness may be cross-examined on every matter concerning which he testified on direct examination is elementary.

In *Resurrection Gold Mining Company v. Fortune Gold Mining Company*, 129 Fed. 668, it was held that the denial or substantial restriction of a full and fair cross-examination of a witness on the subject of his direct examination was reversible error. See also: *State v. Pancoast*, 5 N. D. 516; 67 N. W. 1052; 35 L. R. A. 518.

6. That the Court Erred in Admitting in Evidence the Written Statement of the Witness Amsbaw and in Commenting on the Contents Thereof, and Was Guilty of Misconduct in Its Examination of This Witness.

In appendix C of this brief, we have set out at length for the court's convenience, the testimony of the witness Amsbaw and the proceedings which took place during his testimony. We have likewise set out at the end of said appendix a copy of the exhibit which was ordered admitted in evidence by the court over appellant's objection [Tr. p. 160] and marked by the clerk "Special Exhibit Introduced by Order of the Court."

An examination of Appendix C will disclose that Government's witness Fred C. Amsbaw had at some length testified upon direct examination, when the assistant United States attorney trying the case made the following remark to the court:

> "Mr. Ohannesian: Your Honor, I have a matter that I want to call Your Honor's attention to, but I would rather call Your Honor's attention to it in the absence of the jury.
>
> The Court: Yes. Will you please step outside. (The jury retired from the courtroom.) [Tr. p. 150.]

Whereupon Mr. Ohannesian continued:

> "Your Honor, I have given to counsel a copy of a statement that we claim was signed by the witness. I would like Your Honor to view this statement. This witness was asked, Your Honor—
>
> The Court: Yes. I will take care of it in a minute." [Tr. p. 150.]

A comparison of that statement signed by the witness and of the testimony given by the witness before the jury had been excused and the written statement had been handed to the court, shows that upon direct testimony Amsbaw testified:

> "Bruno told me he was going to do some excavating * * *. The first time when he came out to the ranch, I don't believe he stated what he had been doing. He was going to use a team was all he stated. He said he was going to excavate to level some dirt I think, move it. He said he was going to use the team to move some dirt and level some dirt at his place. That is all I got out of it. On the first occasion, he did not say anything about a pit. * * * I did not see the team working leveling any time day or night. I was on the place when the team was hauling, but I was not when they were working with the dirt. I was at the place there one time when the dirt had been changed around at different times when I was there. It was different because it had been plowed up there, but I didn't see any team working at hauling any dirt or any such. I did not see any team leveling or hauling dirt about. * * * I first saw Herman Quirin when he came and got the team. * * * He stated he was going to use the team for excavating purposes. I believe he stated they were going to have two teams and run different shifts. Herman Quirin came there and took the team away himself. He took the team to Bruno's Ranch. * * * Bruno had one team at one time and then came back and recommended the other man to take the other team so I furnished two teams. This team that Herman took away I think they got for excavating dirt. I did not see that team at work at any time. I know the use they were put to, because they told me. During the time I was on the Bruno ranch all I saw were some trees being dug out and plowing, and where they dug some trees out in this locality. I judged at the time from what he had been talking to me along with other subjects

about putting in some alfalfa there. That is the only thing I know. I saw the hole down there in the low ground just below the Bruno house, but it looked to me as though there had been a lot of trees dug out there. I did not go up to the hole. It did not interest me at all. I saw work was being done in the low ground while I was there. I noticed there was some work being done there, but I didn't know but what it was being leveled for some alfalfa. I did not go down to see what it was. The trees which I have said were torn out were moved back and the stumps were out of the way more. I saw the stumps. They were fair sized trees. They would cover a space to dig a hole I imagine about ten feet in circumference around. * * * The hole out of which the trees came is about where the pit is now." [Tr. pp. 146-150.]

Between this statement made upon direct examination before the jury was excused and the statement contained in his affidavit made to Spencer, an examination will disclose there is but one thing that could even be argued to be a variance, that is, in his oral testimony he used the word "hole" and said they were going to excavate. In the statement, he said Nick Bruno said he had been digging a "pit" on his ranch and wanted to level down the dirt.

Upon this slight and immaterial variance which amounts in fact to nothing more than the interchange of a future and past tense and the use of two words interchangeable in the vocabulary of the ordinary man, the court predicated a long and severe cross-examination out of the presence of the jury, employing much the same tactics as was employed by the court in examining the witness Kelly, the following excerpt being illustrative:

> "The Court: * * * Now, Mr. Amsbaw, the court appreciates that you may be under some reluctance to testify frankly. I have been in this business so often, especially with reference to violations of this particular law, that I can sympathize with a witness who is a neighbor and desires to be careful. At the same time your government is entitled to have a full disclosure from you of all the knowledge you have, and it appears that on the 7th day of February, 1930, in the presence of Mr. Spencer, the investigator, you made a statement in writing regarding this matter. Do you remember that?" [Tr. p. 151.]

and developed as a result of that examination the fact that whereas the word "pit" had been used in the written statement and the word "hole" in the oral testimony, that the written statement had in fact been prepared by investigator Spencer who had then obtained the signature of the witness to it [Tr. pp. 153 and 154], the witness insisting that he believed he had in fact used in relating the facts to Spencer, the word "hole." [Tr. p. 154.]

The jury was recalled, and the witness then severely cross-examined by the court upon the contents of his statement, after which the statement itself was admitted in evidence over the objection of the appellants [Tr. p. 160], the court by his questions indicating that he considered the memory of the witness had been refreshed by this examination. But refreshed as to what? The only possible effect of this entire proceeding was to give the jury the impression that there was something sinister about the fact that the witness had upon one occasion used the word "hole and upon another, the word "pit" and had permitted the agent to obtain his signature to the statement containing the word "pit."

Prior to the cross-examination of this witness by the court, out of the presence of the jury, there was no showing whatsoever, by statement or otherwise, that the prosecuting attorney was surprised by the testimony given by the witness, and no showing as to whether the prosecuting attorney had talked with this witness before placing him on the witness stand.

We contend that this examination was improper upon the same ground and for the same reasons as the like examination of the witness Kelley, and that for it there was even less excuse. We respectfully call the attention of this court to the argument and authorities cited in connection therewith.

To illustrate clearly and how completely the court had abandoned its judicial functions and taken upon itself the functions ordinarily performed by the United States attorney, attention is respectfully directed to the fact that after the conclusion of the cross-examination above referred to the court directed the jury to be brought in. The jury was thereupon returned into the courtroom and the assistant United States attorney then said:

> "Now Mr. Amsbaw—
>
> The Court: The court will ask this question.
>
> Mr. Ohannesian: Pardon me, Your Honor.
>
> The Court: Now, Mr. Amsbaw, in the absence of the jury has your memory been refreshed as to what Mr. Bruno said to you at the time he first came to get the horses in company with Mr. Quirin?" [Tr. p. 156.]

Whereupon Mr. Herron, one of counsel, objected, saying:

> "If the court please, we object to this question and each and every question which shall hereafter be asked of this witness along the general line, for the reasons which I stated to Your Honor in the absence of the jury, and each of those reasons." [Tr. p. 156.

to which guarded objection the court made the following intemperate and prejudicial reply:

> "The Court: Now that objection of yours in the presence of this jury makes it necessary for this court, in order to protect the court, to go something into the reasons why this thing is done. We had hoped to make it unnecessary in the interest of the defense to do that. I will proceed to do it now. You have opened the door." [Tr. p. 156.]

Could anything possibly serve more completely to prejudice the case of appellant Quirin in the mind of the jury than to have it stated to the jury that things had happened out of their presence which required explanation in order that the very court itself might be protected? To indicate to the jury that things had occurred of discredit to the defense for the opportunity to disclose which to the jury, the court was eagerly awaiting the "opening of the door."

Nothing that thereafter happened, could or did remove from the mind of the jury the effect of thus branding the defense, as a thing from which the very court itself needed protection.

The prejudice to appellants is manifest.

7. **That the Court Erred in Denying the Motion of the Appellant Quirin for a Directed Verdict of Not Guilty Made at the Conclusion of the Government's Testimony and Renewed After the Defendants Had Rested.**

Upon the conclusion of the Government's evidence a motion was made on behalf of the appellant Quirin for a directed verdict of not guilty upon the ground of the insufficiency of the evidence. This motion was denied and an exception taken. [Tr. p. 196.] Upon the resting of appellant's case this motion was renewed, again denied and an exception taken. [Tr. p. 31.]

In order to enable the court to determine whether there is in the record sufficient evidence to support the conviction of appellant Herman Quirin on the first count of the indictment, we have, in addition to the statement of facts appearing hereinbefore, set out in Appendix "B" of this brief, a complete statement of the substance of all the testimony in any way relating to Quirin. Summarized, that testimony is as follows:

(1) That Herman Quirin owned and lived in a house on the Perris-Elsinore Highway at a point where that highway was joined by a dirt road leading across his ranch and across the ranch of Bruno to the Bruno dwelling house, and thence proceeding near the still to the back gate of the Bruno Ranch.

(2) That there was located on the Quirin Ranch, close to his house, a mine shaft partially filled with water, from which there was a pipe leading across the Bruno Ranch to a reservoir near the Bruno house, from which reservoir there was a pipe running to a small tank in the still pit;

that this was apparently the only source of water supply for the still.

(3) That between August, 1929 and January 21, 1930, Quirin bought various consignments of lumber from the Dill Lumber Company, containing among other items 2x12's, 2x6's, and 4x4's, and that some lumber of these dimensions was found in the structure of the still.

(4) That on January 21st, 1930, Quirin, in company with Connley, purchased a bill of lumber from the Dill Lumber Company, which lumber was charged to Quirin, and which was called for by a Federal truck that day. Later that day, after the raid had occurred, this lumber was found on the Bruno Ranch, and the next day was picked up by the Dill Lumber Company and returned to their lumber yard.

(5) That in July, 1929, Quirin went to Amsbaw with Bruno and rented a team for use in moving some dirt, which team was taken to the Bruno Ranch and was paid for by Quirin.

(6) That in the summer of 1929, Quirin came to a place where L. L. Matthews was inspecting some government land, about three-quarters of a mile from the Bruno house, and asked Matthews if he (Matthews) had seen an old mule thereabouts; that upon Matthews replying that he had not and asking Quirin what was being done at the Bruno Ranch, there being from that point a pile of dirt visible on the Bruno Ranch, Quirin replied, "They are building a cheese factory down there."

(7) That the truck which was driven away from the Bruno Ranch at the time of the raid was found, a few

moments later, standing near Quirin's house, and that when agent Clements returned with Barber a little while later, the truck was gone.

(8) That when agent Clements and chief of police Barber entered Quirin's house after Clements' statement that he wanted Quirin for a violation of the National Prohibition Act, Quirin said, "What are you going to do? Are you going to take me over and set me on the spot?"

(9) That Barber had seen Quirin and Connley together and Quirin and Bruno together, and had also seen Connley, Bruno and Quirin together near Qiurin's house.

(10) That on one occasion Ed Funk saw Quirin talking to Nick Bruno.

(11) That on the day of the arrest of the defendants, a distillate drum painted the same color and with the same marking on the end as the distillate drums found in the shed on the hill near the Bruno house, was found at the Quirin home.

We will now discuss these items of evidence separately.

(1) There seemed to be some disposition at the trial to argue that the fact that Quirin's house was so close to the juncture of the highway and the dirt road running to Bruno's Ranch showed that Quirin must necessarily have known of the unlawful operations being conducted on Bruno's Ranch.

In addition to the fact that the record is entirely silent as to what hours of the day or night Mr. Quirin was at home or of the hours of the day or night at which materials were hauled to or from the still, the record discloses that there were at least two other roads opening

upon the Perris-Elsinore Highway at points out of the sight and hearing of persons who might have been at the Quirin ranch house, and that these roads gave access to houses belonging to strangers to this action as well as to the Bruno property. The testimony with reference to these roads is collated at the end of Appendix B. From the foregoing, the most that can be deduced is that materials might have been hauled past Quirin's house to and from the still and might have been noticed by Quirin, if he had happened to be at home at the time.

(2) We insist that no inference of guilt can be predicated upon the fact that water from the bottom of the mine shaft on the Quirin property was piped to the water reservoir on the Bruno Ranch. In this connection we call the court's attention to the fact that a pipe led from the bottom of that reservoir underground to the concealed still pit, and there is nothing in the record to show that Quirin knew or had any reason to know either of the existence of that pipe or of the concealed still.

Surely it cannot be argued that in Southern California, where practically all farming is done with the aid of a developed water supply, there is anything suspicious about the utilization of water from every available source. Quirin was not farming, hence had no use for the water from his mine, and it is obvious that to render the mine of any value, it would be necessary that the water in the shaft be removed. The evidence shows that farming operations were being conducted on the Bruno Ranch with the consequent necessity of water for livestock and other farming purposes. Surely the fact that the persons who were conducting the farming, and as it turned out later

the distilling operations, desired to pipe water and pump it from the Quirin mine to the reservoir on the Bruno Ranch, could have no tendency to put Quirin on notice that the water, which is so necessary to any farming operation, was instead to be unlawfully used. The record does not show that more water was pumped from the Quirin mine than it was reasonable to suppose was being used for domestic and farm uses on the Bruno Ranch, nor was there any showing that Quirin had any knowledge as to how much water was in fact pumped, nor in fact that any ever was pumped.

(3) There also seemed to be some disposition on the part of the prosecution to argue at the trial that the various purchases of lumber made by Mr. Quirin from the Dill Lumber Company, commencing with the purchase in August, 1929, and extending over a period of several months, were made in furtherance of the conspiracy charged in the first count, and that the lumber so purchased was used in the construction of the structure of the still. In this respect, the testimony of Mr. Hotchkiss, the manager of the Dill Lumber Company, who sold these various items of lumber to Mr. Quirin, is very illuminating. An examination of his testimony shows [Tr. pp. 169, 170, 171, 172] that most of the material purchased was not heavy timbering such as was used in the still structure, but was the kind of material ordinarily used in the construction of a frame dwelling house. This witness also testified, on direct examination by the Government [Tr. p. 169]:

> "I have with me a list of tags which contain items of building material that we delivered or that was called for by Mr. Quirin, for his house on the high-

way. I have not examined the house on the highway. I have examined the still and its construction so far as the lumber is concerned."

* * * * * * * *

"Our records do not show, and I do not know which of the items were called for by Mr. Quirin or delivered, but the ones which we did deliver were delivered to the house on the highway. None of it was delivered to the Bruno property." [Tr. p 170.]

On cross-examination, this witness testified:

"There were some timbers and lumber in the still, that is, in the framework in the pit in which the still was located, which was lumber other than that which was sold to Mr. Quirin; in other words, there is a great deal of that lumber in there that we didn't sell to him. I would say that 95% of the lumber in the framework of the pit is lumber that we did not sell to Mr. Quirin. The other 5% of the lumber used in the framework of the still might have been part of the lumber that we sold to Mr. Quirin, but I cannot say that it is. Approximately 5% of the lumber that is in the framework could be part of the stuff we sold to Mr. Quirin." [Tr. p. 173.]

The testimony that 5% of the lumber used in the construction of the still resembled in character and hence *could* have been part of the lumber purchased by Quirin, is so purely speculative as in our opinion to fail to create even a suspicion of Quirin's guilt. It must be noted, moreover, that this speculative possibility is negatived by the fact that in that portion of the timbering of the mine shaft visible above the water line, heavy timbers could be seen, the square pieces of which, according to the testimony of agent Spencer, might well have been 4x4s, and in fact were about that size [Tr. p. 56], and

by the fact that an examination of Defendants Exhibit F, a photograph, in the light of the testimony of the witness Barber that the exhaust pipe leading up the shaft from the pump was of 2-inch diameter [Tr. p. 113], shows that the heavy planking constituting the floor of the shaft was, in fact, 2x12s.

It thus becomes obvious that there is in this case an affirmative showing that the lumber purchased by Quirin was employed in the development of Quirin's property, and in the absence of proof in the record that his house was built or his mine timbered with knowledge on his part of the existence of the still, and in order to further its operation, no inference of guilt can be drawn from the fact of such development.

(4) The record shows that on January 21st, 1930, the appellants Quirin and Connley went together to the Dill Lumber Company and purchased a bill of lumber and nails, consisting of four 6x6-14 common rough; sixteen 2x12-10, the same; eight 2x6-16, the same; 15 lbs. of 30 common penny nails and 10 lbs. of 40 common. These goods were charged to Quirin and were called for by a Federal truck that day, which was the day of the arrest of the defendants. The following day the manager of the lumber company drove to the Bruno Ranch, collected the lumber and returned it to the lumber yard. [Tr. pp. 168, 169.] Counsel for the Government argued that this transaction unerringly pointed to Quirin's guilt. But why? Can there be said to be anything in the fact that a person accompanies another and buys lumber, from which lumber a platform for a water tank has begun to be built, to indicate that the person so buying the lumber

knew that when the tank should have been finished and water placed therein, that that water would be used in the operation of a still? There are countless combinations of reasons which would impel such an act, such as perhaps that one man, desiring lumber and not having an account at a lumber company, might ask another to purchase a bill of lumber for him upon the understanding that he should later repay him, or that one person, desiring to build a water tank, might suggest to another that he purchase the lumber and supervise the construction of the platform for the tank, or that one without money in his pocket might, for a few hours employ the credit of another until he might, for example, be able to cash a check, or that one might have been asked by one representing himself to be a contractor, to purchase lumber, being promised thereafter that he would be paid for the lumber and given a job working upon the structure which was to be built.

These are but a few of the numerous situations which may as well have given rise to the transaction set out above, as the theory of the Government that Quirin purchased the lumber and permitted it to be taken to the Bruno Ranch because he was a member of a criminal conspiracy.

The testimony in the record is very meager as to the purpose for which this lumber was to have been used. The only testimony therein is that of agent Clements [Tr. p. 61]:

> "As we started down there, there were two or three gentlemen in the field down below the house at the time, working on something, either a pipe line or on some lumber that was there."

[Tr. p. 62]:

> "As soon as Alles, Walker, Verda and I came back to the house, I asked Walker what his connections were there, and he said he was building a water tank. There was some lumber there which he was working on. He said that he was a contractor."

and that of agent Alles [Tr. p. 77]:

> "We, Connley, Verda, Clements and I, went back to the house and looked in that stone or cement reservoir and examined a little dug out place with some 2x4's there that Mr. Connley was showing us he was working on to build a water tank that was there; and he was down there for that."

There is no evidence whatever in the record to show that this water tank was to be used in connection with the still: It was simply shown that the lumber was found, and the platform for the tank was being built, on the same ranch.

The character of the material was such as would ordinarily be used for any sort of foundation.

(5) The record showing that in June or July, 1929, Quirin went to Amsbaw with Bruno and rented a team for use in moving some dirt, which team was taken to the Bruno Ranch, by Quirin, and paid for by him. The only evidence in the record bearing upon the use to which this team was put, was the testimony of Fred C. Amsbaw that Quirin stated to him:

> "he was going to use the team for excavation purposes."
>
> * * * * * * * *
>
> "I did not see that team at work at any time. I know the use they were put to, because they told me so. During the time I was on the Bruno Ranch

all I saw were some trees being dug out and plowing and where they dug some trees out in this locality. I judged at the time, from what he had been talking to me along on other subjects, about putting in some alfalfa there. That is the only thing I know." [Tr. pp. 148-149.]

If it is the theory of the Government that anyone renting a team to excavate, dig out trees, or prepare for alfalfa on the Bruno Ranch, and taking that team to the ranch, must because of that fact be charged with guilty knowledge of the still found on that ranch six months later, we are at a loss to understand why Amsbaw was not indicted as a conspirator in that he rented the team. Merely to set out this episode is to demonstrate that it is entirely consistent with the innocence of Quirin, indeed we cannot see how it could be contorted into raising even a suspicion of guilt.

(6) A like grasping at straws was found in the Government's contention urged upon the trial that, because Quirin when asked by L. L. Matthews what was going on, on the Bruno Ranch, where a pile of dirt was visible, replied, "They are building a cheese factory down there," the Bruno Ranch being some three-quarters of a mile from where the conversation took place, and it later developed that no cheese factory was built, but that a still was instead there constructed, that an inference of guilty knowledge on the part of Quirin should be drawn. The witness was of the belief that the answer was in all seriousness [Tr. p. 167], as indeed it well may have been, for it should not be lost sight of that the ranch and its surroundings had up to that time been used as a goat farm and that, as evidenced by the testimony of Bruno, he

had at times from 800 to 1200 goats on that ranch alone. [Tr. p. 211.] Many kinds of cheese are of course made from goats milk.

The entire lack of any probative value in this incident becomes apparent upon reflection that the witness may, on the other hand have misunderstood Quirin's mood and his reply may well have been intended facetiously.

(7) We are unable to find anything suspicious in the fact that someone drove a truck away from the Bruno Ranch and left it near Quirin's house, at the juncture of the dirt road and the highway, at a time when Quirin was not at home [Tr. p. 63], nor can we see anything indicative of Quirin's guilt in the circumstance that when questioned by Clements as to what had become of the truck, he informed him that

> "the man that owned the truck took the truck away. I don't know him by name but I know him when I see him." [Tr. p. 63.]

(8) The conversation between Quirin, Clements and Chief of Police Barber, at the time of the arrest of Quirin, is set forth in full on page 28 of Appendix B and in transcript pages 63, 72 and 73. In his direct examination, agent Clements testified that he, accompanied by Barber, walked into Quirin's house. Quirin said, "What do you mean by coming in here?" Clements said, "I have come over after you." Quirin said, "What are you going to do? Take me over and set me on the spot?"

We direct the court's attention to the fact that Clements stated that he informed Quirin that he had come *over* after him. To which Quirin said, "What are going to do? Take me *over* and sit me on the spot?"

His testimony upon cross-examination differed from his statement on direct in that on cross-examination he testified recounting the same conversation:

> "I told Quirin he was under arrest; that I was going to take him over to—. I told him he was under arrest for a violation of the prohibition act." He said, "What are you going to do? Are you going to take me over there and put me on the spot?"

We thus have under oath from Clements, three different versions of what he said to Quirin, to-wit:

1. "I have come over after you."
2. "I told Quirin he was under arrest; that I was going to take him over to—.
3. "I told him he was under arrest for a violation of prohibition act.

And two different versions of Quirin's answer to him:

1. "What are you going to do? Take me over and set me on the spot?"
2. "Are you going to take me over there and put me on the spot?"

To these conflicting versions Clements later in cross-examination added the even more confusing statement that Quirin said:

> "What are you going to do? Are you going to take me over there and put me on the spot. I told him no; that I didn't want him, if he wasn't guilty and, if he was guilty, I wanted him. He said he didn't know nothing about the place over there. *Up to that time as a matter of fact, nothing had been said by either of us as to that place over there except when he was talking about putting him on the spot some place.*" (Italics ours.) [Tr. p. 72.]

We would not burden this Honorable Court, with a detailed and precise discussion of this trivial incident, were it not for the fact that events on the trial lead us to believe that the Government will argue that Mr. Clements' second version of Quirin's answer, coupled with the statement of Clements' italicized hereinabove, show that Quirin knew of the still on the Bruno Ranch.

That this argument can be made only by a selection of a particular version from Mr. Clements' diverse accounts of this conversation is obvious. By what *indicia* are we to conjecture a guess that that particular version is the one which occurred? Any effort to urge such speculation is rendered embarrassing indeed to the Government by the testimony of chief of police Barber of Elsinore who relating the *same* conversation recounted it as follows:

> "Officer Clements and I went to the house and found Mr. Quirin in it shaving. Mr. Clements said that he wanted Mr. Quirin. Clements said to Quirin, 'I want you.' Quirin said, 'Who are you?' Clements said 'We are officers.' And Clements walked in and I followed him. Quirin said, 'wait a minute. Wait a few minutes until I get through shaving.' And Clements said 'All right.' After Mr. Quirin got through shaving Clements said, 'Come on and go with us.' From the house of Quirin we went directly to the Bruna Ranch house." [Tr. p. 108.]

The court will notice that this version of the conversation is barren of any reference to spots "there" or elsewhere.

Conceding for the sake of the argument that such reference was in some form made, we submit it would be natural upon the part of any witness to inquire of arresting officers, (if it was their announced or manifest in-

tention to take him over to the place where the violation of law for which they were arresting him had occurred), whether they desired to take him to that place for the sinister purpose of having him seen at the place where the crime was committed. If counsel correctly understand the colloquialism assertedly employed by Quirin, that is exactly what the statement, "Are you going to take me over and set me on the spot" implies. There is no evidence in the record that Quirin at any time admitted any knowledge of the existence of the still on the Bruno Ranch, or said or did anything from which such knowledge could be inferred.

It has been said, "The guilty flee when no man pursueth, but the righteous are as bold as a lion," and the very fact that Quirin was found by the officers about an hour after the raid in his own house placidly engaged in shaving, is persuasive of the fact that he was innocent of such knowledge. Had he been guilty, he would, no doubt, have followed the tactics of the men in the field and gone over the hills and far away.

(9) The fact that Chief Barber had seen Bruno and Connley together could raise no possible inference that Quirin knew of the existence of the still, and the fact that he likewise testified that he had seen Connelly and Quirin together four or five times, without stating when or under what circumstances he saw them, could establish nothing other than the fact that since they were together, they were probably acquainted. Neither can the fact that he had, at different times, whether before or after the arrest he did not say, while passing along the highway, seen Bruno, Quirin and Connley standing together

near the Quirin house, be significant, or give rise to any inference of guilt on the part of any one of the three. In this connection, it may well be remembered that the jury found that Bruno was not a party to the conspiracy and had no guilty connection therewith.

(10) That on one occasion Ed Funk saw Quirin talking to Nick Bruno, they having as the evidence shows been neighbors, (but the evidence not showing where or when or under what circumstances the conversation took place), may mean something, but we are unable to tell what.

(11) Even more far fetched and fanciful was the contention of the prosecutor that, because a barrel of distillate was found at the Quirin home similar in character and markings to those barrels of distillate found on the Bruno Ranch, a connection of Quirin with the still must be inferred.

Whole towns have been built of discarded Standard Oil cans and the containers of distillate purveyed by any of the great oil companies are common wherever distillate is used.

That the distillate in the drum was intended for use in operating the pump in the Quirin mine seems reasonably certain. An inference may perhaps be drawn from this fact that the persons who were using the Bruno Ranch were pumping water from the mine but, certainly, it could have no tendency to show that Quirin knew that, after the water was pumped to the reservoir near the Bruno house, it was taken from the reservoir to be used in an unlawful enterprise.

There is no evidence in the record to show that Quirin was ever on the Bruno Ranch, either before or after the construction of the still, except immediately after his arrest when he was taken there by the officers.

While it is undoubtedly true that a conspiracy or any other offense may be proved by circumstantial evidence, yet the circumstances must be such as to show beyond all reasonable doubt the guilt of the accused. The legal presumption is that the defendants are not guilty; and unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the Appellate Court to reverse a judgment of conviction.

Vernon v. U. S. (C. C. A.), 146 F. 121, 123, 124;
Wright v. U. S. (C. C. A.), 227, F. 855, 857;
Edwards v. U. S. (C. C. A.), 7 F. (2d) 357, 360;
Siden v. U. S. (C. C. A.), 9 F. (2d) 241, 244;
Ridenour v. U. S. (C. C. A.) 14 F. (2d) 888, 893;
Haning v. U. S., 21 F. (2d) 508, 510;
Sugarman v. U. S., 35 F. (2d) 663 (C. C. A. 9).

Not only do these transactions, analyzed separately as above, afford no substantial evidence of the fact that the appellant Herman Quirin had any connection with the conspiracy charged in the indictment, but considered as a whole they are of no greater effect than to raise a mere suspicion that he might have been so connected.

In considering these facts, if one starts with the assumption that Quirin is guilty, these facts may be argued

to be consistent with that assumption. If, on the other hand, one starts with the assumption that he is innocent, each of these circumstances is equally as consistent with his innocence, nor can it be contended that the sum of several circumstances, each consistent with innocence, can as a whole be consistent only with guilt. It is as true in logic as in mathematics that the sum of eleven ciphers is still a cipher.

8. The United States Attorney Was Guilty of Misconduct in His Argument to the Jury, Which Misconduct Was Prejudicial to the Rights of Appellants.

In his closing argument to the jury, the United States attorney stated:

> "And the defendant was present when they said they were going to move dirt with the team on the place. When Bruno made this statement, the defendant Quirin was present. That is the testimony of Fred C. Amsbaw. You will find that in Volume 3, page 239, lines 16 to 22."

> "If Bruno was going to use this team solely for the purpose of drilling, because he was asked to do that by this so-called Romero, this unknown quantity, this unknown man, why would Herman Quirin pay for the team, if Herman Quirin was not in on this? If Bruno was telling the truth, that he merely took the team in order to drill, why did Herman Quirin pay for the team?" [Tr. p. 226.]

Whereupon counsel objected to this as a misstatement of the evidence, after which the United States attorney again stated:

> "Now, gentlemen, I say to you in July and August Bruno said, or told the witness, rather, Govern-

> ment's witness Amsbaw, in the latter part of July or August, he had been digging a hole. Sometimes he called it a pit and sometimes a hole, and he wanted the team with which to level the dirt. What has that to do with drilling? [Tr. p. 228.]

The testimony was that Bruno had gone with Quirin to Amsbaw in the latter part of July, 1929 and had rented a team, for which Quirin paid, saying that he wanted to level some dirt [Tr. pp. 146, 148 and 149]; that on January 18th, 1930, Bruno rented a grain drill from one Wagoner and on January 20, 1930 Bruno rented from him a team to pull the drill; that Bruno paid for the team and the drill. [Tr. p. 166.]

The harm to the appellant Quirin by the above misquotation of the testimony is apparent. There is no evidence whatever which could have the slightest tendency to indicate that Quirin was in any way connected with the renting by Bruno of the team and grain drill from Wagoner on January 18 and 20, 1930. This transaction was six months after the renting of the team from Amsbaw in July, 1929, and the two transactions were in no way related. The misstatement by the United States attorney tended to connect the appellant, Quirin with the Bruno Ranch immediately prior to the finding of the still, which could not have failed to prejudice Quirin. The prejudice was aggravated by its repetition after the attention of the United States attorney had been directed to it and by the court's statement to counsel concerning the objection and counsel's reiteration of his point as follows:

> "Herron: If the court please, it has nothing to do with it. They were months apart and counsel knows it—six months apart.

Court: It seems to me you are unduly sensitive about this.

Herron: I am, Your Honor; I am might sensitive.

Court: Too sensitive.

Herron: I do not think so, Your Honor. I think when the district attorney has his attention called to a vital error that I am sensitive when I insist—

Ohannesian: I am not in error and I appeal to the jury. I gave the book and pages— (Testimony of Nick Bruno.)

Herron: We assign that as additional error.

Court: Proceed.

Herron: Exception, and we ask the court to withdraw the statement.

Court: You may proceed.

Herron: Exception." [Tr. pp. 228, 229.]

And again, when referring to the testimony of L. L. Matthews [Tr. p. 231] the United States attorney said, inferentially that Quirin had a herd of 800 goats on the Bruno Ranch [Tr. p. 232], and when counsel objected that there was no such testimony, the court criticized counsel in very sarcastic terms for objecting and stated that the United States attorney was not making any misstatements. [Tr. p. 232.]

In his efforts to persuade the jury that the testimony of the defendant, Verda was untrue, the United States attorney, referring to the argument of Mr. Herron, then counsel for the defendant Bruno, said, "And when Mr. Herron, the former district attorney of the United States makes that statement, I am forced to say that it is because he is employed by the defendants and he is obliged to defend them at any cost." [Tr. p. 233.]

Upon it being suggested by the court that the remarks should be withdrawn, the United States attorney offered to withdraw it on condition that counsel for defendant should withdraw their statements that he had misquoted the evidence. When counsel refused to do this, and the United States attorney withdrew his apology, the court aggravated the situation by saying:

> "I think we can save time by disregarding this colloquy between these attorneys, and drop the whole thing out of your mind. It is somewhat unfortunate. I think there has been unusual aggravation of Mr. Ohannesian and he naturally yielded to it, but I hope he will be permitted to continue with his argument and I hope he will not permit himself to be aggravated by these unnecessary and irritating interruptions in making some extravagant remarks hereafter."

The cumulative effect of these misquotations, added to the effect of the attitude of the court throughout the trial, particularly during the testimony of the witnesses Kelley and Amsbaw could not have failed to prejudice the minds of the jury against the appellants. An atmosphere of prejudice permeated the entire proceedings and prevented that fair, dispassionate and impartial trial which is the right of the accused in any criminal case.

In *Latham v. United States,* 226 Fed. 420, the court said:

> "The district attorney, in closing the case for the Government, made the statement that, had the train not been three hours late, he would have had another witness, who would have testified that he also had been defrauded. The defendants' counsel immediately objected, and the objection was sustained by the court, and the jury properly cautioned not to consider said statement of counsel.

The defendants' counsel assign these remarks as error in his twenty-seventh assignment. The almost unbroken line of authorities hold that it is to the action of the court upon the objection to which error may be assigned; that, if the court stops counsel and cautions the jury, this cures the violation of the defendants' right to a trial and verdict on the testimony of witnesses, and not statements of counsel not based on testimony. And in ordinary cases this is the correct rule. Yet in each of the cases expressions will be found which militate against this view in exceptional cases.

Every one must realize that there are exceptional cases where, although the court does stop counsel, and does caution the jury, the impression has been made by the remarks of counsel, and although the jury honestly try to ignore that impression, it still enters into and forms a part of the verdict. In such cases the trial court should set aside the verdict on motion for a new trial. The language of Justice Fowler, in Tucker v. Henniker, 41 N. H. 325, is pertinent, and applies with great force to criminal prosecutions:

'Yet the necessary effect is to bring the statements of counsel to bear upon the verdict with more or less force, according to circumstances; and if they in the slightest degree influenced the finding, the law is violated, and the purity and impartiality of the trial tarnished and weakened. * * It is unreasonable to believe the jury will utterly disregard them. They may struggle to disregard them. They may think they have done so, and still be led involuntarily to shape their verdict under their influence. That influence will be more or less, according to the character of the counsel, his skill and adroitness in argument, and the force and naturalness with which he is able to connect the facts he states with the evidence and circumstances of the case. To an extent not definable, yet to a dangerous extent, they unavoidably operate as evidence which must more or less influence the minds of the jury, not given under

oath, without cross-examination, and irrespective of all those precautionary rules by which competency and pertinency are tested.'

"The prosecuting officer is usually a person of considerable influence in the community, and the fact that he represents the government of the United States lends weight and importance to his utterances. He does not occupy the position of a defendant's counsel, but appears before the jury clothed in official raiment, discharging an official duty. The realization of these considerations should lead the officer to the exercise of the utmost care and caution in making statements before the jury, and should induce him to confine his arguments and statements to the testimony of the witnesses, in order that no right of the defendant is violated."

Counsel for appellants do not contend nor do they believe that the misquotations of the evidence by the United States attorney were intentional, but the prejudice and harmful effect resulting therefrom were as great as though these misstatements had been made designedly, and the duty resting on counsel for defendants to object to them was not affected by the fact they were unintentionally made. Appellants urge that the court has no right to reprimand counsel for making proper objection to the argumeut of opposing counsel.

People v. Hamilton, 268 Ill. 390, 109 N. E. 329.

9. The Court Misdirected the Jury.

The court directed the jury as follows:

"The court is privileged to say to you, and we do now, under the qualification we have already made, that the proof offered by the government, uncontradicted and unexplained, would justify you in finding each one of these defendants guilty as a co-conspirator. We say it would justify you; we do

not say you should do that, because if we should say that we would be invading your province as the sole judges of the facts of the case. We can only say to you that, as a matter of law, these facts, if you deem them to exist, are sufficient in law to support a conviction, but it is for you to say whether you want to make those deductions yourselves and whether you are compelled by a judgment beyond a reasonable doubt to make them to the extent of convicting any one of these men."

Undoubtedly the qualification referred to in this instruction is the statement found on page 240 of the transcript, as follows:

"We are even empowered, if that function is discretely exercised, to advise the jury how the court weighs the facts and what the court's conclusions are as to any disputed question of fact. In 20 years' experience on this bench I have not attempted to go that far in very many cases, if ever, and it is not the court's purpose to go that far here. I only speak of it because some of you may be more familiar with a different practice and think it is strange that we go as far as we may go in this instruction. But you are the sole judges after all of the facts in the case and not the court. The court may discuss the facts only by way of assisting you to put the facts accepted by you in their proper legal relationship, only to make the law of the case clear to you, not to influence your judgment as to what the ultimate facts are."

This instruction was excepted to [Tr. p. 254, Ex. 45] and was not corrected by the court.

While the above instruction referred only to the first count of the indictment, it is made to apply to the remaining counts by the following portion of the court's charge:

"Now, it follows—sufficiently in this case, at least, because of the uncontradicted nature of the govern-

ment's testimony—that whomever you convict, if two or more, under this conspiracy charge, may be convicted under each one of the other charges." [Tr. p. 251.]

The foregoing instruction is virtually an instruction that, as a matter of law, the appellants were guilty of the offense charged and was a palpable invasion of the province of the jury to pass upon the weight of the evidence.

In this case the Government attempted to convict the defendants by circumstantial evidence. There was no direct testimony as to the actual participation of the defendants or either of the appellants, in acts which, we may say as a matter of law, make them guilty. The Government relied on a proof of a chain of circumstances to establish the participation of these appellants, of the crime charged, and it was for the jury to say whether or not the circumstances shown would warrant them in believing, beyond a reasonable doubt, that these appellants had so participated.

By the foregoing instruction, the court limited the function of the jury to a determination of the truthfulness of the witnesses, and, usurping the function of the jury, directed it as to what inference should be drawn from the facts testified by the witnesses, if the jury believed them to exist.

Such an instruction was held erroneous in *Hickory v. United States,* 160 U. S. 408, 40 L. Ed. 474.

In this case the court instructed the jury:

"But the law recognizes another proposition as true, and it is that 'the wicked flee when no man

pursueth, but the innocent are as bold as a lion.' That is a self-evident proposition that has been recognized so often by mankind that we can take it as an axiom and apply it to this case."

In commenting on this instruction, the court said:

"This instruction was tantamount to saying to the jury that flight created a legal presumption of guilt, so strong and so conclusive that it was the duty of the jury to act on it as an axiomatic truth. On this subject also, it is true, the charge thus given was apparently afterwards qualified by the statement that the jury had a right to take the fact of flight into consideration, but these words did not correct the illegal charge already given. Indeed, taking the instruction that flight created a legal presumption of guilt with the qualifying words subsequently used, they were both equivalent to saying to the jury that they were, in considering the facts, to give them the weight which, as a matter of law, the court declared they were entitled to have, that is, as creating a legal presumption so well settled, as to amount virtually to a conclusive proof of guilt."

See, also:

Starr v. U. S., 153 U. S. 614, 38 L. Ed. 841;
Blair v. U. S., 241 Fed. 217 (C. C. A. 9th).

In *Starr v. U. S., supra,* the court said:

"It is true that in the Federal courts the rule that obtains is similar to that in the English courts, and the presiding judge may, if in his discretion he think proper, sum up the facts to the jury; and if no rule of law is incorrectly stated, and the matters of facts are ultimately submitted to the determination of the jury, it has been held that an expression of opinion upon the facts is not reviewable on error. Rucker v. Wheeler, 127 U. S. 85, 93 (32:102, 105); Lovejoy v. United States, 128 U. S. 171, 173 (32:389, 390). But he should take care to separate

the law from the facts and to leave the latter in unequivocal terms to the judgment of the jury as their true and peculiar province. M'Lanahan v. Universal Ins. Co., 26 U. S. 1 Pet. 170, 182 (7:98, 104). As the jurors are the triers of facts, expressions of opinion by the court should be so guarded as to leave the jury free in the exercise of their own judgments. They should be made distinctly to understand that the instruction is not given as to a point of law by which they are to be governed, but as a mere opinion as to the facts to which they should give no more weight than it was entitled to."

The trial court also instructed the jury:

"You are justified in assuming that the pipeline from the Quirin mine to the well or to the still was an essential factor of this unlawful operation. You have seen how obvious that was in its close association to the Quirin residence, and, in the absence of anything to qualify the force and effect of that testimony, you are justified, if you conclude to do so, in assuming that Quirin permitted his premises to be used in this enterprise, at least to that extent and if he did that consciously, knowing that he was making thereby a contribution to this unlawful act, he associated himself with it as fully as if he were there all the time actively at work underground, and this is independent of the other testimony which has been argued to you, coming from the government, of his association with the man Connley—otherwise Walker —and Bruno at various times." [Tr. p. 250.]

To this instruction, the appellants excepted in the following language:

"Mr. Belt: Yes, I have an exception I would like to have noted, Your Honor, in the interest of the defendant Quirin, to the statement that the jury would be warranted in believing that Quirin permitted water knowingly to be taken from his reservoir for use in the still." [Tr. p. 255, Exc. 46.]

After which exception the court further instructed the jury as follows:

> "The Court: The court means by that—and if I didn't make it plain, I will do so now—that in view of all circumstances the construction there at the mine, especially in proximity to Quirin's residence, the character of the pipe and the direction which it took, the ownership of the property by Quirin and the incidents that would normally accompany the pumping of water in that shaft to go through that pipe, these things unexplained would warrant the jury in concluding that Quirin consented consciously, knowingly and willingly to the use of his premises to that extent to aid this unlawful enterprise. When we say that we do not mean that should be your conclusion, because that is your business, not the court's. I am only telling you if you base upon those incidents a conclusion that Quirin was a party to the conspiracy, it would stand in law. That is all." [Tr. p. 255.]

The appellants submit that the instruction given by the court following counsel's exception made manifest and aggravated the error in the original instruction, instead of correcting it. The vice in this instruction is two-fold: first, that it ignores the fact that all of the acts which the evidence show, were done by Quirin, do not of necessity render him guilty of any of the charges in the indictment, unless they were done with guilty knowledge that a still was located on the Bruno Ranch and that his acts or some of them, would contribute to its operation; second, the charge of the court embraces both questions of law and fact and amount to an instruction that, as a matter of law, the jury should follow the court's opinion as to a matter of fact.

That there was no evidence to support the court's view that the evidence disclosed beyond a reasonable doubt, such knowledge on the part of Quirin, has been argued at length under point 7, subdivision 2, at page 59 of this brief.

The second objection to this instruction is based on the same reason and authority as our objection to the first instruction considered herein. (Page 79 of this brief.)

For the foregoing reasons, the appellants respectfully urge that the judgments of conviction should be reversed and a new trial ordered.

Respectfully submitted,

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~~C. L. BEER~~,

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APPENDIX A.

The Substance of All Testimony and Proceedings in Re Misconduct of Trial Court on Examination of Government's Witness Kelly.

On March 19, 1930, Richard Kelly, called as a witness for the government, testified:

"I have been sick abed for the last five or six days and just got out of a sick bed to come over here.

The Court: Mr. Kelly has bronchitis and that may account for his condition of voice.

The Witness: I am the proprietor of the boiler works located at 557 Mission Road, this City. I buy and rebuild and sell boilers and tanks. I have been in business about 30 years. Am acquainted with Pete Valero, who has worked for me about a year. He was so working in the month of December, 1929.

Referring to March 7, 1929, I at that time sold to one P. Walker a boiler. The man that bought that boiler came to my place of business in March of 1929. He was a large, heavy man. [Tr. p. 81.] There are twenty or thirty people in every day talking about boilers and—referring to your question as to whether a man by the name of P. Walker came to my place of business either in the month of March or July, 1929, and bought a boiler, all those things are of record in our books. Our books are here. I am selling boilers every day. I remember selling a man a boiler by the name of Walker. But they come in every day. I had the transaction with that man personally. He was a large man, is about all I can remember of him. I should say his age was about 30; somewhere around that. He would weigh about 200 pounds; somewhere around that. I wouldn't say he would probably weigh a little over that. After this date I did not sell this same man, P. Walker, another boiler.

Answering your question as to whether I obtained for this man Walker a Thompson boiler, I will tell

you how that happened. They wanted terms on a part of the payment of the boiler and they wanted me to arrange to get it, that is, those people that got the boiler did. I think it was in January that these men came in and made arrangements to purchase a Thompson boiler. But we have records concerning that transaction.

(Being shown a statement on the letterhead of the Thompson Boiler Works and asked if he had ever seen it before) the witness continued [Tr. p. 82]:

I can't see this but I can tell you about the transaction. I can't read it. I can't see it. Anyway, I can tell you all about it without this. These people wanted to get a boiler, that is, two or three people. The man known to me as P. Walker was one of them. He did most of the talking, I guess. He said he wanted this boiler and he wanted to get time on part of it, and he wanted me to arrange to let him have the boiler and pay what he could on it and have a contract on the balance. But Thompson wasn't willing to let the boiler go that way. So I dropped out of it. And they bought the boiler and paid cash for it and I didn't have a thing to do with it. The boiler wasn't charged to my account. They paid the Thompson Boiler Works cash for it. I did not have a thing to do with it. I didn't get a penny out of it or didn't have anything to do with it.

Q. How come that upon this photostatic copy that his Honor has upon his desk there it appears to be charged to the Kelly Boiler Works?

The Court: It wasn't charged to them. It was billed. It is marked as having been paid in cash.

Mr. Belt: Further objection is made that the witness has failed to identify the exhibit as offered.

The Court: The witness first said he had the records showing the transaction, but now he says the transaction didn't occur at all. Now, which is right?

The Witness: We have no records concerning this transaction at all. I never had possession of the

boiler; didn't own it and didn't sell it. [Tr. p. 83.] I took them over to the Thompson Boiler Works, though that is, I took the bunch over there. As to whether or not cash was paid by Walker and his companions, I wasn't present. I found out it wasn't going my way and I had other business to attend to. So I didn't pay any further attention to it. This all occurred in January of this year, I think shortly after New Years. I think the date is on that contract there. I think this is the date that is on this sheet. That is the time that this transaction took place. I haven't read it at all. If that is the bill, that is the date. When I am well I can see well enough with my glasses on. I use just ordinary glasses. I am nearly 68 years old. I have my glasses here.

Q. By Mr. Ohannesian (Referring to the bill which had been handed to the witness): What is this here?

The Witness: I don't know anything about it. I don't think I have ever seen that paper before. I don't know what transaction that bill refers to. I notice that it is billed to my firm, the Kelly Boiler Works. I take it for granted that that was the date they got the boiler. As I said before, I didn't have a thing to do with the purchase of the boiler. They bought it themselves because I haven't got any records in my books concerning it at all. I don't know anything about that paper. I notice that the paper bills a boiler to the Kelly Boiler Manufacturing Company. My company did not buy a boiler of the Thompson people on that occasion. It was probably billed to me because they started in to buy the boiler on contract and have it charged to me; and Thompson wouldn't let it go that way. So I just dropped the whole thing and didn't have anything more to do with it. [Tr. p. 84.] I don't remember now whether while I was there negotiating with the Thompson people on that occasion anybody undertook to make out a bill to me. This man Walker who went with me on that occasion was about 30

years old and a large man, weighing 200 pounds or over, and was smooth shaven as near as I can remember. I don't believe I saw him with his hat off. All of the other transactions I had with them are all on our books. Any other deal which we had besides this is all on our books. They got some pumps later, I think, and then returned them again. I don't remember whether we sold to one P. Walker on August 30th—three lubricators. All of the transactions are on our books, which are here in court. You can get all of that in the books. I wouldn't carry that in my head. My bookkeeper is here as a witness. She can tell you all about that. I don't pay any attention to the books at all. The book which you have just handed me is my book all right and all entries for the month of August, 1929, to and including November and December, 1929, are in that book and they refer to items sold to P. Walker. If it is in there, it is all right. I think the boiler that these men wanted from me, which they finally got from the Boiler Works, was about a 30-horse-power boiler, made by Thompson. I suppose it carried their name on the boiler. I don't remember the dates when Pete Valero worked for me in the month of December, 1929. In the month of December he went to their place. I didn't know where he was. I instructed him to go. He went to their place. I don't know where it was. They picked him up and brought him back. Some of their drivers picked him up. [Tr. p. 85.] I know they wanted some repairs done; the Walker outfit wanted it. They applied for me to get somebody to do some work for them. I don't remember now who it was that applied. There were four or five of them. There were several of them in there at different times. I don't remember which ones it was ordered this work done. It was before I took these parties over to Thompson's that I had this pump transaction with them. So when Walker came to me after a boiler I had seen him before several times. He did not tell me where the boiler was to go or where the pumps were to go."

Thereupon counsel for all of the defendants announced that they did not desire to cross-examine the witness. The assistant United States Attorney then stated:

> "At this time, may it please the Court, I am somewhat surprised at the testimony given by the witness in some respects; and, in order to call his attention particularly to a transaction had with Mr. Spencer relative to this matter, I want to ask him if he did not have a talk concerning this matter, or rather an interview, with Mr. Spencer, the government investigator, about this boiler. Did you not? [Tr. p. 86.]
>
> Mr. Graham: I object to that.
>
> The Court: He may answer yes or no.
>
> Mr. Graham: I want to state my objection, your Honor. It is objected to on the ground that it is an attempt to impeach his own witness.
>
> The Court: Overruled. Proceed.
>
> Mr. Graham: An exception.
>
> The Witness: Mr. Spencer spoke to me concerning this boiler and its sale and movement and the sale of other articles, such as tubings. And I attempted to tell him truthfully what I knew about it. I recall that Mr. Spencer (whom the witness identified as being a man who stood up in the courtroom) spoke to me concerning the sale of these boilers and other articles to Walker. That conversation took place about two weeks ago in my yard.
>
> Mr. Graham: It is understood that this is all subject to our objection.
>
> The Court: Yes; certainly.
>
> The Witness: I don't think anybody else was present other than my self and Spencer; that is, when he came over there first there was some one who was I suppose an officer with him. The second time there wasn't. It was about two weeks ago when he came there the first time and the second time was four or five days later. At that time he was alone. [Tr. p. 87.]

Q. By Mr. Ohannesian: Did that Mr. Spencer ask you whether or not you had sold a boiler in July, 1929, to Mr. Walker, alias Mr. Connley, and you said yes? A. No—I—

The Court: Wait a minute. Is there any objection to that?

Mr. Graham: That is objected to, first, on the ground it is leading and suggestive and, second, on the ground it is an attempt to cross-examine his own witness and to impeach his own witness and, third, on the ground that no mention has ever been made here about Mr. Connley. The testimony has all been about P. Walker.

The Court: In view of the character of this witness' testimony and his slowness to answer the questions and the answers as given to the questions sometimes, the court will permit the government not to impeach this witness' testimony, which, of course, is objectionable, but to refer this witness to statements that he may have made heretofore about the same transaction for the purpose of now refreshing his memory. The witness comes on the stand and says he is ill and his testimony, speaking discreetly, is very vague. His memory can't be refreshed by the recall to him of statements. Of course it has to be pretty carefully put.

Mr. Graham: An exception.

Q. By Mr. Ohannesian: Following the instructions of the court and not by way of impeachment of the witness, only to assist you in recalling the conversation that you had with Mr. Spencer—

The Court: No, not for that purpose; only to refresh his memory so that he may testify from a refreshed memory at this time. [Tr. p. 88.]

Mr. Ohannesian: Very well.

Q. With that in mind, do you recall the conversation that you had with Mr. Spencer concerning these matters?

Mr. Graham: We object to that on the ground that is not the fact that is material, whether he had the conversation.

The Court: Overruled. We need some preliminary steps always before we can walk. Go on.

Mr. Graham: An exception.

The Witness: Well, I don't remember the conversation I had with Mr. Spencer concerning these matters. He asked me about buying his first boiler. I think; and I told him all of the records are on the books. I don't carry these dates and books in my head. I have a set of books for that purpose. I don't think that at that time there was any conversation relative to the purchase of the Thompson Boiler. If there was I just simply told him I didn't have anything to do with it. I had a conversation concerning a Thompson boiler. I don't remember whether the Thompson boiler was mentioned or not. I thought it was the first boiler they got you were trying to find out about. There was a first boiler. They did buy a boiler from me. I sold tubings to Mr. Walker for the first boiler at a later date. They came and got these tubings themselves, that is, those people that were having the work done came. I don't know who they were. They had three or four drivers that used to come by and pick stuff up. Some of the drivers got it. I don't recall who ordered the tubing for the first boiler but I have a book record for that. [Tr. p. 89.] Everything is in the book. I was present when the tubings were sold for the first boiler. I am the one that sold it. I don't remember what the man looked like to whom I sold it. There were three or four of them in there off and on. I don't know which particular one ordered the tubing. I don't remember the date when I sold a certain number of tubings for the first boiler but I remember I sold them some tubing. It is in the book. I don't know whether I recall or remember the appearance of the man to whom I sold them. There were two or three of them came in there. They didn't give any names at all. All of it was carried in the books under the name of

"P. Walker." As I said before, P. Walker, under whose name I carried these items, was a heavy set man, weighing something like 200 pounds or more. From the very beginning of these transactions they were carried on the books in the name of P. Walker, which was the only name we had. I got that name at the beginning of this business with them and everything they got was charged to P. Walker. We didn't charge anything to him until they ordered the first boiler. That was when the account started. This first boiler was about a 30-horse-power boiler, not a Thompson boiler. That was bought about a year ago. I don't remember the date. It is all on the books there. There were two or three of them in there at the time of the negotiations for that boiler. One of them called himself P. Walker. I didn't hear the names of the others. I don't remember whether the same man who called himself P. Walker came in afterwards and ordered the tubings and fittings and pumps and other things like that. [Tr. p. 90.] I only seen him a couple of times. That is how we got our account started under the name of P. Walker, because he ordered this boiler, and everything else went on the book under that account. They paid cash but we made the entries on the books under the name of Walker. They always paid cash. They didn't always pay cash at the time but they would pay it later. They didn't get any credit to speak of. When they got the boiler they paid for it; and those other little items there wasn't any of them that amounted to very much. They usually came in a few days later and paid it. A man by the name of Walker was one of them who spoke to me concerning the Thompson boiler."

(Counsel for defendants announcing they did not desire to cross-examine, this witness was excused.) [Tr. p. 91.]

On March 21, 1930, Russell F. Thompson, called as a witness, testified substantially as follows:

That he was the assistant manager of the Thompson Boiler Works, manufacturers of steam boilers, hot water

heaters, valves and necessary fittings, and was slightly acquainted with Mr. Kelly; that on January 8, 1930, he saw Kelly at the Thompson plant; that Kelly brought some gentlemen over that wanted a boiler of about 40 horse-power; [Tr. p. 137] that they wanted to buy it from Kelly who did not have the article in stock and thinking that Mr. Thompson would have it, brought them over to the Thompson plant to get what they wanted. We sold them a 40 horse-power Dry Back Scotch Marine Type boiler, it carried the name Thompson on the front of the combustion chamber, on the water column and on the back and the initials "T. B. W." on the smoke stack. [Tr. p. 139.] This was the only 40 horse-power boiler of this type sold by us in January, 1930. [Tr. p. 140.] Government's Exhibit 10 is a picture of the boiler so sold. These men wanted to purchase the boiler on credit but as they could not give me a credit rating, I refused to give them credit and they paid for it in cash. [Tr. p. 145.] The price was $1450. [Tr. p. 144.] Mr. Kelly brought these men over; stayed there a few minutes and then Mr. Kelly left. The other men stayed there until my men had loaded the boiler on their truck and they left with the boiler. [Tr. p. 142.] Our bookkeeper made out the bill (a photostatic copy of which is marked Government's Exhibit No. 18), showing the sale of this boiler to the Kelly Boiler Works. I had him ask the man who bought the boiler to whom I should make out the bill and they told him the Kelly Boiler Works. The Kelly Boiler Works did not participate by way of commission or otherwise in the transaction. [Tr. pp. 142 and 143.]

On March 25, 1930, during the testimony of Albert Kruse, an employee of Richard Kelly, the following proceeding took place:

"The Court: I don't see why this court shouldn't order that man Kelly in here again.

Mr. Ohannesian: Your Honor, in the absence of the jury, I may have something to state on that.

The Court: You may step out a few minutes, gentlemen. We will see about this.

(The jury retired from the courtroom.)

Mr. Ohannesian: Your Honor, yesterday some person came up to my office who was well acquainted with Mr. Kelly and, in fact, he has worked at Mr. Kelly's place—not this gentleman—and he stated that after Mr. Kelly had gone back to his place of business he said, "Well, they didn't get anything out of me; I couldn't read or see, and they wanted to give me some glasses to read with, and I had my glasses in my pocket all the time. They didn't get anything out of me." [Tr. pp. 184, 185.]

The Court: I was very well satisfied that Mr. Kelly was determined the other day not to make a witness in this case if he could help it.

Mr. Ohannesian: I didn't want to bring this matter up and would not have unless it was suggested by the court, because I thought it might in some way interfere with the due progress of this case, and would take it up at a later date. But I am willing to abide by whatever ruling your Honor wants to make. I do think Mr. Kelly ought to be brought before this court.

The Court: Well, when it comes to the question of identification, certainly Kelly ought to be able to help, better than this man. Would you know the man you saw talking with Kelly again, if you saw him?

The Witness: Well, I probably would, although there is lots of people coming in there and the chances are I may and the chances are I may not.

The Court: He had his hat on?

The Witness: I saw the man, as far as that is concerned, with his hat off and on.

Mr. Ohannesian: I think I can clear it up; I don't know. It is very unfortunate the witness is not here. I asked this man how many times this man objected to the way in which the base was being made and whether or not the same individual had been there before, referring to the defendant, and this man said he had been there several times. I think if questioned he will say the same individual was there on several occasions. I had not completed my examination of this witness. [Tr. pp. 185 and 186.]

The Court: Telephone Mr. Kelly and tell him he has to come up without further delay. We will not hold this court up.

Mr. Graham: May I suggest, Your Honor, we want to object to counsel making any statements in front of the wtiness before questioning him.

The Court: Counsel undoubtedly has talked to this witness before.

Mr. Ohannesian: I personally have.

Mr. Graham: Exception. We move that the statement of counsel be stricken, the statement as to what he expected to prove by this witness.

The Court: There is no jury here.

Mr. Ohannesian: Let it go out. I have no objection.

The Court: You may bring the jury back again. Who did Mr. Kelly make this boast to, that he would put it over on the court? You have his name, have you?

Mr. Ohannesian: Yes, I have. I have his name. We will have him here.

Mr. Graham: If the court please, if we are going into this matter of Mr. Kelly, I think it should be done in the absence of this witness.

The Court: Why? [Tr. p. 186.]

Mr. Graham: Because it will give the witness the idea if he does not identify some one he will get himself in wrong with the court.

The Court: Oh, no, no. That is not a valid objection.

Mr. Graham: I want the record to show that we take an exception to the procedure.

The Court: Very well. You may have your exception.

(The jury returned to the courtroom.)

The Witness: I have seen the gentleman whom I have described, and who questioned the manner in which the base was built, there at the Kelly Boiler Works two or three times. I am sure they drove in there with a Ford sedan, and I seen them in the office two or three different times, talking with Mr. Kelly and the bookkeeper, Fred Ranney. This man was standing when he was talking to Mr. Kelly about the base. I have seen him sitting down in the office I guess a couple or three times, maybe more, and I have seen him walk from his car to the office. I never noticed him sitting down inside with his hat on. I saw him there, oh, I don't know—that must have been three or four different times; anyway I seen him two or three times in the office, and I seen him that time when he came down and spoke to Mr. Kelly about the base. I didn't pay any particular attention. From the witness stand it appears to me like this man between the two gentlemen in gray (indicating the defendant Connley)." [Tr. p. 187.]

The Court: Telephone Mr. Kelly and tell him he is to come up without further delay. We will not hold this court up.

The Court: Can anyone inform the court as to whether Mr. Kelly is on his way here in response to any telephone message, and, if he is, how long it will take him to get here.

(Whereupon Mr. Kelly appeared in the courtroom.)

The Court: Bring him in here. Mr. Kelly, come forward please. Take a seat there.

(Whereupon on March 25, 1930, the following proceedings took place in the absence of the jury:

"By the Court: Mr. Kelly, when you were on the stand the other day the court told you that you were temporarily excused, but that it might transpire that he would call you back, do you remember that? A. Yes.

Q. You do remember that. Since you have been here, since you have testified, testimony has come to this court very clearly and in a good deal of detail, that you had business transactions with the man known to you as Walker, a good many times; that on one occasion, [Tr. p. 92] with reference to a boiler which has been identified as a dismantled boiler on the Bruno premises, which had been bought from you some time prior to last January, you had ordered one of your workmen to rearrange and reset that boiler on its base because of the direction of this customer, whose complaint was that the base of the boiler and the riveting of it to the base had not been sufficiently protected by cement to keep the heat from disturbing the riveting. I am free to say to you and do say it with some emphasis that we were not satisfied with your conduct on the witness stand the other day. It was quite obvious, not only to the court, but to those who witnessed you testify, that you were minded not to be frank. The episode of your glasses, particularly was convincing that you were attempting to withhold from this jury and from this court information which you obviously had. At least, you were attempting to thwart the production of the truth. Now, developments this morning convince the court that you know a good deal more about this matter than you have hitherto testified to; that you are, to say the least, able to identify the man Walker, known to you as Walker, a man whom your records show

had been a customer of yours covering a period of time, as the man who came back and had your workman Kruse change the setting of the boiler. And we expect you to get your memory in shape to identify that man if he is in the courtroom. Do you understand what the court means and says? A. Yes, sir.

Q. How about it?

Mr. Belt: Your Honor please, at this time— [Tr. p. 93.]

The Court: You can take your exceptions after I get through with Mr. Kelly. I don't care to have Mr. Kelly diverted from what the court is saying.

Mr. Belt: I would like to have the record show my objection.

The Court: You can make your objection when the time is opportune. These interruptions are disconcerting.

Mr. Belt: I think now is the opportune time for the objection.

The Court: Now, Mr. Kelly—

Mr. Belt: An exception.

Q. The Court: Don't you think you could identify the man with whom you had that transaction? A. I don't know. I haven't got very much of a memory for faces—

Q. Do you mean to tell this court that you can't identify a man with whom you had a dozen business transactions regarding two boilers within the last 7 or 8 months?

Mr. Belt: I object to the form of the question on the ground it is attempting to intimidate this witness. This witness has heretofore appeared before this Honorable Court and has testified to the very best of his knowledge and authority, and the remarks of Your Honor at this time can have absolutely no other effect.

The Court: This court doesn't need your help or your advice, Mr. Belt.

Mr. Belt: I know, Your Honor, but I am representing two defendants here, and they are entitled to some protection. [Tr. p. 94.]

The Court: You have your objection in the record. We will proceed with this witness.

Mr. Belt: An exception.

Q. By the Court: Do you mean to call this court—

Mr. Belt: I would like to have the record show also, if Your Honor please, that the court in addressing this witness struck the bench with his fist.

The Court: You may have that. You may get a movie-tone in here and put it in a movie, if you want to.

Mr. Belt: An exception.

Q. By the Court: Do you mean to tell the court you can't identify this man, P. Walker, who had frequent business transactions with you regarding two boilers within the last seven or eight months? A. I only met this man supposed to be Walker two or three times.

Q. You met him two or three times? You sold him the boiler first, didn't you, an upright boiler? A. Yes.

The Court: An upright boiler? A. Yes.

Q. And you had it set on this base in your plant, didn't you? A. No, sir.

Q. Beg pardon? A. No, they came and got it and set it themselves. [Tr. p. 95.]

Q. The base was fastened to the lower part of the boiler in your plant wasn't it?

Mr. Belt: If Your Honor please, I object to that as assuming a fact not in evidence.

The Court: Let him answer.

Q. Wasn't it?

Mr. Belt: Exception.

A. Why, they took the boiler out there, and afterwards they came back and they got another base for it, as I remember it.

By the Court: You remember that? A. Yes.

Q. And you remember that there was some complaint in your office that the riveting of the base was not sufficiently protected by concrete, don't you? A. I think they had to change the position of the ring that held the base in place.

Q. That was done in your plant, wasn't it? A. Yes.

Q. And the boiler and base were there then, weren't they? A. No, just the base.

Q. Just the base, the ring on the base was changed? A. Yes.

Q. At the suggestion of this customer? A. Yes.

Q. And Mr. Kruse did it, is that right? A. No, Mr. Kruse—there was twelve men working over there, and I don't remember who did the work.

Q. You remember it was done under your direction? [Tr. p. 96.] A. Yes.

Q. You had a talk with P. Walker respecting that, didn't you? A. Yes, sir.

Q. And that was when? A. Well, I don't remember the dates; I can't remember the dates at all.

Q. Well, you remember that it was the first boiler, the upright boiler, don't you? A. Yes, sir.

Q. And then some time afterwards he came back to buy another boiler and you took him to the Thompson people, didn't you? A. Yes, sir.

Q. Personally? A. Yes, sir.

Q. You accompanied him to the Thompson people? A. Yes, sir.

Q. And then he bought tubing of you in various quantities, didn't he, and other fixtures? A. Just one lot—

Q. He was there how many times? A. He wasn't there all of those times. He was there about two or three times altogether.

Q. And he dealt with you? A. Yes, sir.

Q. Now, are you able to identify him if you see him? A. No.

Q. What is that? A. No, sir; I couldn't tell for sure.

Q. I don't care whether you can tell for sure. Are you able to make a tentative identification? [Tr. p. 97.] A. I could tell whether he looked like him or not. He was a large man.

Q. Have you got your glasses with you? A. Yes.

Q. Will you need your glasses for identification purposes? A. No, I only use them for reading.

Q. Just for reading. Then you step down within the bar here, and walk around among the people and see if you can identify that man known to you as Walker, who had those transactions with you.

Mr. Belt: At this time I want to renew my objection to the whole of the proceedings on the ground stated in my first objection.

The Court: Very well. You have your record. Proceed.

Mr. Belt: And I further object to the attempted identification on the same ground.

The Court: Proceed, Mr. Kelly.

Mr. Belt: Exception.

Mr. Herron: Exception.

The Court: You can begin at the blackboard and swing all around inside of the bar; don't go outside of the bar; make a circle and pass the ladies, clear around to the jury box. You can go closer, if you desire.

Mr. Belt: Now, if Your Honor please, I don't want to appear argumentative or anything of that

character, but in directing this witness to make the inspection, Your Honor directed him to make an investigation of the persons inside the rail. [Tr. p. 98.] You did not ask him to go outside.

The Court: Let's see. There are 23 persons inside of the railing besides counsel. That is enough.

Mr. Graham: If the court please, I would like to call the court's attention to the fact that some of the people involved in the case here are outside of the railing.

The Court: Well, we will try the people inside of the railing first.

Mr. Graham: Exception.

Q. By the Court: Do you see anybody inside of the railing that, in your judgment, appears like the man who had these several business transactions with you? A. Well, I wouldn't say that I could identify any of them, Your Honor.

Q. You see nobody that resembles that man?

Mr. Belt: If Your Honor please, I again object to the form of the question. It can have positively no other effect upon this witness than an attempt to intimidate him.

The Court: Well, you are getting in your objections.

Mr. Belt: Exception.

The Court: Proceed, Mr. Kelly.

Mr. Belt: It appears to counsel, if Your Honor please, that there should be some limit to this. [Tr. p. 99.]

The Court: The court is of the opinion that this witness is bound not to be frank. He has convinced the court of that.

Mr. Belt: I object to that, if Your Honor please.

The Court: And he is bound to come through, if it is possible.

Mr. Belt: He has answered honestly, to the very best of his ability.

The Court: He does not need your help, Mr. Belt.

Mr. Belt: I know, but my clients need my help, if Your Honor please.

The Court: Mr. Belt is a portly man. Does he resemble him? A. What is that, Your Honor?

The Court: Does Mr. Belt resemble the man who had the business transactions with you?

Q. By Mr. Belt: In your opinion, Mr. Kelly, how much do I weigh?

The Court: Mr. Kelly is now answering the court's question.

Mr. Belt: Pardon me.

A. No, I never seen this man before that I remember of.

Q. By the Court: What is that? A. I say I never seen this man before that I know of.

The Court: Now, Mr. Kelly, walk over here where the bailiff sits and you go around the circle, clear to the jury box and examine the 15 or 20 or 25 individuals that sit up along against the bar, and see if you can find the man that you had business with, or a man who looks like that man. [Tr. p. 100.]

Mr. Herron: It may be understood, I take it, if the court please, for the purpose of the record, that we are understood to have made the same objections to each and every question.

The Court: Yes, but each time you object you interrupt and disturb the thread.

Mr. Herron: Well, we won't object any more, if the record may show this, that we object to each and every one of these questions.

The Court: In whose behalf are you objecting?

Mr. Herron: On behalf of all of the defendants, if Your Honor please.

The Court: Excuse me. We will not hear your objection, except on behalf of the clients that you represent. Mr. Belt is perfectly capable of taking care of his objections.

Mr. Herron: If Your Honor please, at the opening of the trial—

The Court: It makes no difference. Mr. Belt is now taking care of his clients.

Mr. Belt: If Your Honor please, in view of the fact that I have interposed several objections which were overruled, I take an exception. I ask that each question that Your Honor has asked will be deemed to be objected to and an exception taken.

The Court: That will be satisfactory. Nobody else need to get on his feet and object.

Mr. Herron: With due deference to the court, I wish to say that I join in that objection, and exception.

The Court: Mr. Kelly, kindly follow the court's directions. Move around in a circle on the other side [Tr. p. 101] of the table and look at each individual and see if you can see the man with whom you had this transaction, or a man that looks like him. A. Well, I couldn't say that there was anybody that I can—

Wait until you sit down before you talk. I can't hear you.

A. I wouldn't say that there was anybody there that I could say for sure.

I am not asking you whether you can see anyone there that you can say for sure. Do you see anyone there that resembles him, in your judgment, that you saw when you were down there? A. Well, the nearest one down there that I can say that I think looks like him—

Q. Which one? A. That one (indicating).

Q. Well, that doesn't mean anything. Which one? Where is he sitting? A. He is sitting next to that lady there.

Mr. Graham: I couldn't hear that. Will you read that answer please?

The Court: He said he was sitting next to the lady.

Q. Next to the lady with the scarf? A. Yes.

Q. That looks like the man that you had the dealings with? A. He looks more like him than anybody else that I see here.

Q. What is your judgment; is it your best impression that was or was not the man? [Tr. p. 102.] A. Well, I couldn't say for sure.

Q. I am not asking you whether you can say for sure. That is your impression about it? A. Well, all I can say—

Mr. Belt: Now, if Your Honor please—

The Court: Now, this witness is about to answer, and you are interrupting.

Mr. Belt: All right. If Your Honor please, if you will bear with me for just a second. Your Honor asked him a specific question, and he gave you an answer that possibly could not be construed in any other light. He said there was only one man in the room that resembled the man that came to the Kelly plant, and he pointed out the defendant Connley. Now, any other questions along that line, in the opinion of counsel, would be surplusage, and would not affect anything at all.

Q. By the Court: Mr. Kelly, what is your impression; was this man or was he not the man with whom you had the transaction,—not for sure, but your impression now? A. Well, I would say he looks more like him than anybody else I see down there.

Q. Well, does he look like him? A. Well, in a general way, yes.

Q. In a general way he resembles the man that you had these several transactions with, is that right? Is that your answer? A. Yes, sir.

The Court: Very well. Bring in the jury.

Mr. Belt: Now, Mr. Kelly, isn't it a fact that the only way that the defendant which you have pointed out here resembles the man that called at your place of business is from the fact that he is portly, heavy set, in other words? [Tr. p. 103.] A. Yes.

Mr. Ohannesian: Now, may it please the court, at this period I don't understand that there is any cross-examination necessary, because this is a matter outside of the trial of the case, and has not bearing upon the trial of the case, and it is also understood—

The Court: Yes.

Mr. Ohannesian (continuing): —that it is in the absence of the jury, and is not a part of the record.

Mr. Belt: Do I understand—

Mr. Ohannesian: Just a minute.

Mr. Belt: I beg your pardon.

Mr. Ohannesian: At this time I want the record to show that all that has transpired since the absence of the jury is not a part of the record, and as such will not be made a part of the record.

Mr. Belt: To which we object.

The Court: The record will show that this has been done in the absence of the jury.

Mr. Ohannesian: And not a part of the case.

The Court: And not a part of the case, so far as the jury has the case.

Mr. Herron: And the objections of the defendants are that they are foreclosed the opportunity of examining the man along the same line that counsel is examining him. May the record so show?

The Court: You have enough, gentlemen. You have got your record preserved.

Mr. Herron: If the court please— [Tr. p. 104.]

The Court: You will have your opportunity of examining.

Mr. Herron: We ask, if the court please, that we be given an opportunity to examine out of the pres-

ence of the jury, and take an exception with respect to the refusal so to permit us.

(At this point the jury returned to the courtroom.)

The Court: You may sit down.

Mr. Herron: Exception.

The Court: Do you want to question Mr. Kelly?

Mr. Ohannesian: No, Your Honor, we have no questions to ask this witness.

Mr. Herron: We have none.

The Court: The court will accept that responsibility, gentlemen, with pleasure, as a matter of necessity.

Q. By the Court: Now, Mr. Kelly, you testified the other day that you had several business transactions respecting the sale of a boiler to a man by the name of P. Walker, do you recall that?

Mr. Belt: Now, if Your Honor please, at this time I would like to object to any questions being asked this witness that Your Honor has asked of him out of the presence of the jury.

The Court: The court has not yet undertaken to do so. When the court undertakes to do that, why, then you may make your objection.

Q. Do you remember that?

Mr. Belt: On the same grounds, if Your Honor please, as the objections taken outside of the presence of the jury. [Tr. p. 105.]

The Court: Mr. Kelly—

Mr. Belt: Exception.

The Court (continuing): In order to keep your thoughts straight after this interruption, the court will have to repeat the question. This is the question:

Q. Do you recall testifying the other day that you had several business transactions with a man by the name of, or who gave you the name of P. Walker,

who bought a boiler of you and some other material, shown by your books, and whom you sent over to the Thompson Works for a boiler? Do you remember that? A. Yes.

Q. Tell the jury whether you see in the courtroom a man who resembles this P. Walker with whom you had these transactions.

Mr. Belt: I object to that question on the same grounds stated in my previous objection.

The Court: Very well.

Mr. Belt: Exception.

The Court: Your objection is noted. Answer it. A. I am looking at the people—

The Court: Louder, please.

A. I am telling the jury I looked at the people around the jury there.

The Court: Around the courtroom, you mean.

The Witness: Around the courtroom, yes, and I only see one that I would say resembled this man that went by the name of Mr. Walker. I wouldn't say that was him for sure, but—

The Court: Which man is it? [Tr. p. 106.]

The Witness: This man sitting over there with the red necktie.

Mr. Belt: We stipulate he is pointing to the defendant Connley—I will withdraw that.

The Court: You mean the man sitting next to the lady with the scarf on?

The Witness: Yes, sir.

The Court: Let the record show the defendant indicates the defendant Connley alias Walker. Cross-examine.

Mr. Belt: No cross-examination.

Mr. Graham: No questions.

The Court: That is all, Mr. Kelly.

Mr. Ohannesian: We would ask that Mr. Kelly remain for a few minutes.

The Court: You will remain for a few minutes, Mr. Kelly.

The Witness: Here or outside?

The Court: Oh, you may sit in the courtroom.

Mr. Ohannesian: We ask at this time we have an intermission until the usual hour and I will try to get another witness here.

The Court: Do you want to talk to Mr. Kelly about this other matter?

Mr. Ohannesian: No.

(At this point, the court, out of the hearing of the jury, directed the marshal to detain Mr. Kelly in his custody.) [Tr. p. 107.]

APPENDIX "B."

The Substance of All Testimony and Proceedings in Any Way Concerning Appellant Herman Quirin.

According to the testimony of O. G. Spencer, Herman Quirin lived in a small house on the Perris-Elsinore highway. A dirt road leads off of the highway practically straight north of this house, running within thirty feet of it. It is not a graded road, just level ground that has been driven over. It passes in front of his house and straight south across his property through a gate in the fence around Bruno's property, where it runs straight on past the Bruno house and goes between where the still was found and the shed in which were found the distillate drums. [Tr. p. 45.] The still was located in a pit 40x 50 feet, 200 feet southeast of the corner of the Bruno house. On Quirin's land about 100 feet from his house was the shaft of an old mine [Tr. p. 46], in which at the time of the arrest of the various defendants, on a platform about 60 feet from the entrance, a gasoline engine driven power pump was mounted. The exhaust ran up the shaft to the top, ending in a Ford muffler. Connected directly to the pump was a 2-inch iron pipe. The pipe came out of the dump or mine shaft and ran underground to a small reservoir near the Bruno house. A 2-inch pipe ran from the bottom of that reservoir directly to a small tank in the still pit. Apparently there was no other source of water for the still. [Tr. p. 47.] There were 4 or 5 places between the mine and the concrete reservoir where the pipe cropped out of the ground [Tr. p. 53]. In a shed on the hill near the Bruno house, there were 60 distillate drums. There was one similar drum painted the same

color with the same marking on the end, at the Quirin home near the road when Spencer arrived there [Tr. p. 54.] Spencer made an investigation of the lumber that was used in the Quirin house, of that used in the mine pit, and of that used in the still pit. In the still pit were 4 x 4's, 2 x 4's, and 2 x 12's. There were two or three 8 x 8's and several 6 x 6's. [Tr. p. 55.] The witness found none of like dimension in the house known as the Quirin house. He did find in the mine pit some 2 x 2's and some 2 x 4's. He found no 4 x 4's in the mine pit [Tr. p. 55]. However, in the mine pit were some square timbers about the size of 4 x 4's, which might have been 4 x 4's [Tr. p. 56].

William P. Clements, a Federal prohibition agent, testified that, in company with Agent Alles, he went to the Bruno ranch at about 1 P. M. on anuary 21st, 1930. He found there the defendants Bruno, Verda, and Connley, and saw two or three other men working in a field. A search of the place disclosed the still and the three above-named defendants were placed under arrest. [Tr. pp. 58, 59, 60, 61.] One of the men in the field was seen to climb on a truck and drive away in the direction of the Quirin house [Tr. p. 62]. After the three defendants had been placed under arrest, Clements left Verda and Connley in the custody of Alles and followed the truck to Quirin's house. When Clements arrived there, the truck was stopped in the rear of the house. After ascertaining that there was no one in or around the house, Clements took the rotor from the distributor of the truck, drove to Elsinore, telephoned the Prohibition Department at Los Angeles, and returned to the Quirin house in company with Chief of Police Barber of Elsinore, where they found that

the truck was gone and found appellant Quirin alone in the house shaving. [Tr. p. 63.] Clements testified that he walked in. Quirin said, "What do you mean by coming in here?" Clements said, "I have come over after you." Quirin said, "What are you going to do? Take me over and set me on the spot?" So Clements told Quirin that he wasn't setting anybody on the spot; that if Quirin was guilty, he (Clements) wanted him, and if he wasn't guilty, he didn't want him. Clements then asked Quirin what became of the truck. Quirin said, "Well, the man that owned the truck took the truck away." Clements asked, "Do you know the man that owned the truck?" Quirin said, "I saw him a few times." Clements said, "Well, who was he?" Quirin said, "Well, I don't know him by name but I know him when I see him." [Tr. p. 63.] When Quirin finished shaving, Clements and Barber placed him under arrest and took him over to the still. [Tr. p. 64.]

Bruno's ranch cannot be seen from Quirin's house [Tr. p. 66]. There is at least one road into the Bruno ranch, other than the road past Quirin's house [Tr. p. 66].

Clements further testified:

> "When I drove up to the house on the Bruno ranch I first saw the truck that I have testified about. It was a Federal truck. I got the license number. Had occasion to look at the registration and found it registered in the name O. B. Ziegler, 151 North Avenue 20, Los Angeles. C-9518 is the 1929 license number. The next time I saw that truck it was standing behind the defendant Quirin's house. That was around 30 minutes later. But time traveled fast and I wouldn't be sure; there was so much doing all at once. I took the rotary off the distributor and have it here. I did that for the purpose of stopping the ignition. I went

to Quirin's house first. There was nobody there. The house showed signs of being inhabited. I didn't search it. I just walked through it to see if there was anybody in there. And there was nobody in there, and I turned around and walked out and went to Elsinore. Subsequently I returned to the Quirin house and the truck was gone. At that time I found Herman Quirin, the defendant here, at the premises. I walked in the house; did not rap; did not ring a bell. The door was open and I walked in. I saw the defendant Quirin standing in front of the mirror shaving. He spoke first, saying, "What do you want?" I told him I wanted him. At that time I told him I was an officer of the law; told him I was a federal officer. I had my buzzer or badge on. The badge is marked, disclosing the fact that I was a prohibition agent. I had my badge on my vest under my coat. I told Quirin he was under arrest; that I was going to take him over to—I told him he was under arrest for a violation of the prohibition act. He said, "What are you going to do? Are you going to take me over there and put me on the spot?" I told him no; that I didn't want him if he wasn't guilty and, if he was guilty, I wanted him. He said he didn't know nothing about the place over there. Up to that time, as a matter of fact, nothing had been said by either of us as to that place over there except when he was talking about putting him on the spot some place. He eventually accompanied me; and I took him over to the Bruno Ranch. And eventually all of the defendants were gathered together there and subsequently incarcerated at Elsinore. [Tr. pp. 71, 72, 73.]

A. G. Barber, Chief of Police of Elsinore, a witness on behalf of the Government, testified that he met Prohibition Agent Clements about 2 p. m. on January 21st, 1930, and accompanied him to the Bruno Ranch. Prior to arriving at the Bruno Ranch, they arrived at the house of Herman Quirin, where they found Mr. Quirin shaving. Mr. Clements said that he wanted Mr. Quirin. Clements

said to Quirin, "I want you." Quirin said, "Who are you?" Clements said, "We are officers." Clements and the witness walked in. Quirin requested that they wait until he finished shaving, and Clements agreed, after which the officers took Quirin directly to the Bruno Ranch-house. In the Quirin house, there were two or three beds. A table was set, and the breakfast dishes had not been cleared off the table. The house was about 30 feet from the Elsinore highway [Tr. pp. 108, 109]. This witness saw a 2-inch pipe line coming out of a mine shaft near the Quirin house, running in the direction of the still. From the pipe line it ran to a small reservoir near the Bruno house, and from the reservoir was a pipe line running to the still. He searched, but found no other source of water supply for the still. [Tr. p. 113.] He testified that on January 21st, the day of the arrest of the defendants, there was no break in the pipe line. In the mine was a gasoline engine about 60 feet down the shaft [Tr. p. 114]. This witness testified that he had seen Herman Quirin before; had seen him several times in and around Elsinore. At times he had seen Quirin with Connley, and at other times with Bruno. He had seen him approximately 4 or 5 times with Connley and more than once with Bruno. He saw the three of them close together out there by the Quirin property while he was going along the highway, at different times. [Tr. p. 114.] On cross-examination, this witness testified that on the day of the raid he followed the pipe line from the mine down to the inside of the Bruno property, through the reservoir to the pit by the still, and on that occasion the pipe was continuously connected so far as was visible above ground. [Tr. pp. 116 and 117.]

During the testimony of Mr. Barber, the court, the jury, the parties and all counsel went to the Quirin Ranch and to the Bruno Ranch, and inspected the Quirin house, the mine shaft on the Quirin land, the pipe line coming out of the mine shaft, the Bruno ranch, the reservoir, house, shed, and the pit containing the still, as well as all the surroundings. The various articles and places were pointed out to the jury by the witnesses who had testified and by counsel for both sides.

Fred C. Amsbaw testified that in the summer of 1929, defendant Nick Bruno came to see him in company with the appellant Herman Quirin; that Bruno and Quirin stated that they wanted to rent a team from him; that they had dug a hole and wished to level some dirt. Bruno introduced Quirin to Amsbaw and stated that he would stand good for the team. Quirin paid the rental on the team and left with it. He took the team to Bruno's Ranch. This witness was later on Bruno's Ranch and saw the team there, but did not see the team working. During the time the witness was on the Bruno Ranch, he saw there were some trees being dug out and some plowing being done where the trees had been. There was a hole in the low ground just below the Bruno house, where the still was later found. A boy returned the team to Amsbaw. [Tr. pp. 146, 147, 148 and 149.]

Ed Funk, a witness called by the Government, testified that on one occasion he saw the defendant Herman Quirin talking to Nick Bruno. [Tr. p. 164.]

L. L. Matthews, a witness called by the Government, testified that during the latter part of July or the early part of August, he saw the defendant Herman Quirin

at his house near Elsinore. He had a conversation with Quirin, the witness' brother being the only other person present. He asked Quirin about certain section lines and the corners; that he walked to a piece of Government land about three-quarters of a mile west of Bruno's house. Quirin came up to the witness there and inquired about a mule. The witness saw a large pile of dirt down by Bruno's house, about three-quarters of a mile away, and asked Quirin what they were doing there. Quirin answered that they were building a cheese factory down there. This statement of Quirin's seemed to the witness to be intended seriously. The witness saw a team there by the pile of dirt, but could not say for sure that he saw anyone working there. [Tr. p. 167.]

N. S. Hotchkiss, a witness called by the Government, testified that he was the manager of the Dill Lumber Company at Elsinore; that he knew the defendants Herman Quirin, Nick Bruno, and Peter Connley; that he had had business transactions with Quirin and Connley. In August, 1929, he sold certain lumber to Herman Quirin. Quirin made a number of purchases of lumber between August, 1929, and January 21st, 1930, on which date Connley and Quirin came together and purchased a quantity of lumber which was billed to H. F. Quirin, and which was not delivered but was called for by a Federal truck. [Tr. pp. 168, 169.] This particular lot was never paid for, the witness stating that on the day following its purchase, he went to the Bruno Ranch and loaded the lumber on his truck and returned it to the Dill Lumber Company. Quirin paid for all of the other consignments of lumber purchased by him. [Tr. p. 169.]

Some of the consignments of lumber purchased by Quirin were delivered at Quirin's house, and some were called for by Quirin. None of it was delivered to the Bruno property. [Tr. p. 170.] The witness identified 22 sales tags, showing sales of lumber and building material to Herman Quirin, which were introduced as Government's Exhibit No. 20. [Tr. pp. 170-172.] The witness testified that he examined the lumber in the frame work of the still and found that there were several items listed on the tags that were similar in kind and dimension to some of the timber that was used in the still, such as 2 x 12's, 2 x 6's, and 4 x 4's [Tr. p. 172]. On cross-examination, this witness testified that 95% of the lumber in the frame work of the pit was lumber that his company did not sell Mr. Quirin. The other 5% of the lumber used in the frame work of the pit was similar in size and dimension to some of the lumber sold to Mr. Quirin and might have been that lumber, but the witness stated that he could not say that it was [Tr. p. 173]. He further testified that he had sold approximately 20 pieces of 4 x 4's to Quirin, but did not recall the number of feet. In an examination of the still framework, he did find lumber there that corresponded to that size and number. He did not examine the Quirin house to see whether these 4 x 4's went into that house. He did not find any other timber in that still or in the framework of the still which he recalled as being timber that he might have sold to the defendants or timber of like character. He further testified that he was not familiar with the Quirin Ranch nor with the house thereon; that he had been on that property but not while Quirin was living there. He did not look in the mine on that property. The cleats shown

in the picture of the entrance of the mine were 2 x 4's. The roofing on the Quirin house would correspond to the amount of roofing shown on the bills. [Tr. pp. 173 and 174].

Defendant Nick Bruno, testifying in his own behalf, stated that in August, 1929, he leased his ranch to a man named Frank Romero who stated that he was going to plant the ranch to alfalfa, and that he was going to dig a well and put in a pumping plant at the place where the still was later discovered; and Bruno, further testifying, stated:

> "As I have said, in June I got a team of horses from a man by the name of Amsbaw to carry my hay in from the field to bale it. At a later time I rented another team from Amsbaw. After Frank Romero bought my team and the tools he says, 'Well, this team can't do all the work. We want you to find another team. We don't know nobody here.' He told me this mule too poor, can't do all the work. 'I want you to find a team. I give you a man and you go with him, and you know somebody around here who got a team, and we rent.' And he give me a man and I went to the city. We used to know this fellow here. I know him the first time, and he went down, this man need a team to deliver some dirt, and this man all right, I says, if you let him have it. And he let us have the team. He drive the team home, and I went home to the same ranch where the still later was. When I mentioned Ramirez I meant the man whom I also called Romero. It is the same man. "Ramirez" is a Spanish name, and "Romero" is Italian. I saw Ramirez there after I got the team. I got the man down there. He took the team and put them in the corral. That was in the afternoon about five or six o'clock when the team reached the ranch." [Tr. p. 213.]

On cross-examination Bruno testified that he had bought his ranch about three years ago. He further testified:

> "When I bought the ranch there was no house near the highway, the Elsinore-Perris road. That house was put up about a year and a half ago. A fellow named Herman lived there. I don't know exactly his name. He is in the courtroom. He is that gentleman there, the bald headed fellow (indicating the defendant Herman Quirin). He built the house about a year and a half ago. That house was there complete in the month of July, 1929. I am referring to the house marked "B" on the Elsinore-Perris road. It is not a new house, built within the last four or five months, but there was about a couple of rooms built on there. He added new rooms to it when he came down there. Then after that he built another one, like a screen porch, on the same house; he connected with the same house. I guess that was last summer some time. I don't remember exactly. I know where that old mine pit is. I know that old mine a long time ago. I got the goats down there. I bought that ranch two years ago, but I have the goats down there before two years. I got the goat ranch about five or six years. I do not know when the mine pit was boarded in. When I know the mine there was nothing in the mine. The last time I saw the mine was when the jury come all down there, last Thursday. The last time I saw the mine before I went out there with the jury was before I come here in the court. I was there. I see that six years ago, five years ago, four years ago, three years ago, two years ago, I used to see that mine. I did not see who put the planks in there. I do not know when the planks were put in there. I never saw the work done in there. I do not know when the planks were put in there. I never saw that." [Tr. pp. 219, 220.]

Defendants' Exhibit "A", a panoramic photograph, discloses the location of the roads in relation to the Quirin house. [Tr. p. 66.]

The attention of the court is respectfully directed to Defendants' Exhibit B [Tr. p. 67], also showing the entire extent of the road from the back gate of the Bruno ranch to the highway.

The testimony concerning the roads from the Perris-Elsinore highway giving access to the Bruno ranch and the location of the Quirin property with reference thereto is collated below. Wm. P. Clements, testified:

> "The road that runs past Quirin's house into the Bruno ranch is not a straight road. There is a little curve around the hill; and then it goes right straight in. I don't believe you can see Quirin's house from the Bruno ranch. I saw some different roads running in off the highway in the direction of the Bruno ranch other than the one past Quirin's house; and I have gone over some of those other roads. I don't think there are several roads to get into the Bruno ranch other than the road past Quirin's house, but there is one other that I know of. If there are others around there, I didn't see any. Referring to the one I know of, it hit the main highway I would say possibly half a mile toward Elsinore around a little hill there." [Tr. p. 66.]

During the view of the premises by the court, the following occurred:

Counsel for appellants standing at a pit a short distance from the mine shaft on the Quirin property, stated:

> "Mr. Herron: I think the jury should notice at this point that from the house on the hill which has

been referred to in the testimony as the Bruno house, the Quirin house down by the road is not visible, or vice versa.

The Court: Yes; that is plain." [Tr. p. 121.]

And again, while court and jury were standing on the Bruno ranch at the rear of the Bruno house:

"Mr. Herron: We just want you to observe that this road runs to the back gate, around the back line of the plowed area to the point where it meets with a road that runs along the fence on the east side. Then it follows around back of those hills, coming into the Elsinore-Perris road at a point just practically, by the speedometer, a mile from the Quirin house, measuring a mile from the Quirin house toward Elsinore.

Mr. Graham: Another thing we wish to call your attention to is the road which comes down to the back gate runs to those houses which you observe up on the hill." [Tr. p. 134.]

"Mr. Herron: Let's make a stipulation to this effect: The United States attorney and the attorneys for the defendants stipulate that the road which comes in the front gate of the ranch property runs by the house and out the back gate, and opens into a road which follows the back line of the Bruno property, where it joins a road which comes up the side line of the property and goes around past the front gate. Also, that from the point where the road leaves the back gate of the ranch and travels down and joins the road coming up the side of the ranch the road extends straight ahead and angles back over around the hills, coming into the highway running from Elsinore to Perris, which was the

paved highway we came up, at a point about one mile closer to Elsinore than the Quirin house is located." [Tr. p. 135.]

"Mr. Ohannesian: That is a correct statement.

Mr. Herron: In other words, there is a road leading into the back of the ranch from the highway as well as the front." [Tr. p. 135.]

Mr. Graham: We also want to call attention to the fact that there are two roads leading to the front gate of the Bruno ranch. [Tr. p. 136.]

Mr. Graham: It is apparent that there are two roads leading to the front gate of the Bruno Ranch, one which comes past the Quirin house and the other coming off of the Elsinore to Perris highway at a point one mile nearer Elsinore than Quirin's house. [Tr. p. 136.]

APPENDIX "C."

The Testimony of the Witness Amsbaw and the Proceedings in Relation Thereto.

Fred C. Amsbaw, a witness on behalf of the plaintiff, testified as follows:

Direct Examination

By Mr. Ohannesian:

The Witness: I live at Wildemar about six miles from Elsinore. I know where the Nick Bruno ranch is located. I knew Nick Bruno in the latter part of July, 1929, when he rented my team. He came to see me, and brought another party with him, and wanted to get my team. He said he would stand good for the team. This other man that came with him was a Mr. McPherrin, I believe. He, Mr. McPherrin, rode one horse and led the other and taken them up to his place. Mr. Bruno went back to his ranch. They were taking the stock up to his, Mr. Bruno's ranch. He, Mr. Bruno, told me he was going to do some excavating. I thereafter had occasion to go out on the Bruno ranch. I remember the first time I was out on that ranch. That was about the middle of July or something such. I have been there three or four times. I bought a couple of goats from him. The first time I went out there to the Bruno ranch I saw Mr. Bruno and his wife. One time when I saw him he was milking goats. The first time I went there after he rented my horses it was at the house when I approached the house coming in; but I didn't see him doing anything. I went there a second time and Bruno was around the house. The second time I saw him he was in the house which was part lumber and part adobe, that is, the house on the hill by the trees. I saw him there a third time. He was not doing anything. I once saw him hauling some hay there. [Tr. p. 146.] I saw him using that team. The first time I was there and saw him using the team he was hauling hay on the ranch. I guess he got his hay various

places where he could get it and feed his goats. The first time when he came out to the ranch I don't believe he stated what he had been doing. He was going to use a team, was all he stated. He said he was going to excavate, to level some dirt, I think, move it. He said he was going to use the team to move some dirt and level some dirt at his place. That is all I got out of it. On the first occasion he did not say anything about a pit. I can't say that at any time I saw the team at work. I was by there and saw the team in the corral in the daytime but he had two teams there and seemed to be working them at different times. I did not see the team working leveling any time day or night. I was on the place when the team was hauling but I was not when they were working with the dirt.

Q. By Mr. Ohannesian: Were you ever on the place when you saw Mr. Bruno leveling the dirt?

Mr. Herron: We object to that as having been asked and answered.

The Court: No; he has not been asked that particular question.

Mr. Herron: Exception.

A. No; I wasn't. I was at the place there one time when the dirt had been changed around at different times when I was there, it was different, because it had been plowed up there; but I didn't see any team working at hauling any dirt or any such. I did not see any team leveling or hauling dirt about. [Tr. p. 147.] I did not see anyone leveling dirt there with a team or without a team day or night. I had more than one conversation with Bruno. The second time I had a conversation with Bruno was with regard to a goat, about me getting a goat. I had no other conversation; just those two occasions. That is all I talked to Mr. Bruno. The horses were brought back to my place from Wednesday to Wednesday. That was a week, seven days, they were kept. A boy brought the team back. I would judge he was about 18 or 19 years old.

I have seen the defendant Herman Quirin. He is in the courtroom. I first saw him when he came and got the team. That was about the first part of June. I had a conversation with him. I talked with him. He stated that he was going to use the team for excavating purposes. I believe he stated they were going to have two teams and run different shifts. That is all he said. I talked with him and I told him the team had been on pasture and they weren't in good condition to do a great lot of real lugging work, that is, in the way of moving dirt. He said they would work them in the afternoon when it was cooler. He said they were going to move some dirt with the team on the place. My wife and I were there when that was said. Mr. Quirin was present talking to me. There was a boy with him. When I saw the team it was on Bruno's place. After the team was taken back Herman Quirin came there and took the team away himself. He took the team to Bruno's ranch. I saw the team there once when they took them away. I didn't investigate around at all or ask any questions. Herman Quirin paid for the team. Bruno had one team at one time and then came back and recommended the other man to take the other team. [Tr. p. 148.] So I furnished two teams. This team that Herman took away I think they got for excavating dirt. I did not see that team at work at any time. I know the use they were put to because they told me so. During the time I was on the Bruno ranch all I saw were some trees being dug out and plowing and where they dug some trees out in this locality. I judged at the time, from what he had been talking to me along on other subjects, about putting in some alfalfa there. That is the only thing I know. I saw a hole down there in the low ground just below the Bruno house, but it looked to me as though there had been a lot of trees dug out there. I did not go up to the hole. It did not interest me at all. I saw work being done in the low ground while I was there. I noticed there was some work done there but I didn't know but what it was being leveled

for some alfalfa. I did not go down to see what it was. The trees which I have said were torn out were moved and the stumps were back out of the way more. I saw the stumps. They were fair sized trees. They would cover a space to dig a hole, I imagine, about ten feet in circumference, around. I saw the trunks of the trees. They were willow trees. I noticed the trunks were drug back more on a hill. With reference to the Bruno house, the house is on a knoll and the trees were drug out over on another knoll. The hole out of which the trees came is about where the pit is now. I have been over there and know where the pit is now. With relation to where it now is the trees were growing on identically the same spot. I saw the space on which there now appears to be a stack of hay before the hay was there. There was a little house setting right there where that hay is now when I first saw the place. [Tr. p. 149.] I saw that the house had disappeared from where it was then. At the time I was there he was building the little tin house where the gas tanks is now. I cannot say that I noticed any buildings going up or work going on where those trees were uprooted that I have just described. I never saw that work going in. After the trees were taken out there was some excavating work done there undoubtedly, which I noticed. I noticed there had been more dirt dug up and moved. I noticed there was a kid there working doing the leveling and an old gentleman there, too.

Directing my attention to Mr. Verda, the old gentleman in the courtroom, I never saw that man there. I never saw any of the defendants that are here out there leveling the ground. None of the defendants told me they had done any of the leveling out there.

Mr. Ohannesian: Your Honor, I have a matter that I want to call Your Honor's attention to, but I would rather call Your Honor's attention to it in the absence of the jury.

The Court: Yes. Will you please step outside?

(The jury retired from the courtroom.)

Mr. Ohannesian: Your Honor, I have given to counsel a copy of a statement that we claim was signed by the witness. I would like Your Honor to view this statement. This witness was asked, Your Honor—

The Court: Yes. I will take care of it in a minute.

Mr. Ohannesian: Very well.

Mr. Herron: We think the witness should be excused during the time—

The Court (Interrupting): No. The witness will stay here. Now, Mr. Amsbaw, the court appreciates that you may be under some reluctance to testify frankly. I have been in this business so often, especially with reference to violations of this particular law, that I can sympathize with a witness who is a neighbor and desires to be careful. At the same time your government is entitled to have a full disclosure from you of all the knowledge you have, and it appears that on the 7th day of February, 1930, in the presence of Mr. Spencer, the investigator, you made a statement in writing regarding this matter. Do you remember that? A. Yes, sir.

Q. By the Court: And you signed it? A. Yes.

The Court: Now, I will show you what purports to be that, and ask you if that is the statement that you made?

Mr. Herron: If Your Honor please, I feel that for the purpose of the record we must object to this proceeding and this examination.

The Court: Very well. You may enter your objection and an exception. Proceed.

Mr. Graham: An exception.

A. Yes, sir.

The Court: Is that statement true? A. Yes, sir.

The Court: And it is true, then, that at the time that Bruno came to you in the latter part of July, 1929, he said he had been digging a pit on his ranch

and wanted to level down the dirt? He said that, did he? A. Yes.

The Court: You asked him to go along, that you might drive your team, and he refused and said he had a man to drive it? A. Yes.

The Court: And that Quirin came with him? A. Yes.

Q. By the Court: And drove the team, yes? That is right, is it? A. Yes, sir.

The Court: And this statement that you made refreshes your memory as to what happened in that transaction, does it? A. Yes.

The Court: Do you want anything more with this witness before the jury comes back?

Mr. Ohannesian: No, Your Honor, I think not.

Mr. Herron: I would like to ask him a question. Are you certain that those were the exact words, that he had been digging a pit on his ranch?

The Court: No, he doesn't have to be certain about the exact words.

Mr. Graham: Your Honor, it is very important whether Bruno told him he was digging a pit, or simply was leveling some dirt.

The Court: Did he tell you he had been digging a pit? A. He stated he was going to level some dirt where there was a hole.

The Court: You say in this statement that he told you he was digging a pit. Is that true or not? A. Wouldn't you call a large sized hole somewhat of a pit?

The Court: Yes. But did he say that he was digging a pit? A. He didn't say he was digging—he said a hole.

The Court: Now, you say here that he said he had been digging a pit on his ranch and wanted to level down dirt. Did he say that or not? A. The pit proposition is what gets me.

The Court: Well, you can remember whether or not he said that he was digging a pit, can't you? A. The hole proposition would be similar to a pit, the way I look at it.

The Court: Did he say he had been digging a hole? A. Yes.

The Court: He said he had been digging a hole? A. Yes.

The Court: Do you think he used the word "hole" rather than "pit"? A. Yes.

The Court: And that he had been digging it? A. Yes.

The Court: Anything more?

Mr. Herron: Did he say he had been or was going to? A. He had been, and wanted to level the dirt down.

Q. By Mr. Herron: And wanted to level the dirt down? A. Yes, sir.

Q. Did you write this report or dictate it, or did Mr. Spencer, the agent, write it up from what you said, and then ask you to sign it? [Tr. p. 153.] A. He wrote it up and asked me to sign it.

Q. And the language in that report is his language, isn't it?

Mr. Ohannesian: We object to that.

The Court: He may answer that.

Q. By Mr. Herron: The language in the report is his language, isn't it? A. Yes, it is his language, and yet it might not be just as I worded it, and yet it would make it come out in the right language.

Q. It is the same effect, but the exact language is the language of Spencer, isn't it? A. Yes.

The Court: But the only criticism you make of it is that he used the word "pit" where you said "hole"? A. Yes.

Q. By Mr. Ohannesian: It was after Mr. Spencer had spoken to you and asked you what the facts

were that he wrote this up, is that right? A. Yes, that there has been typewritten over.

The Court: Did you read it over before you signed it? A. Well, I read the paper that was written over.

The Court: This paper that you signed here? A. Yes.

The Court: And the only modification you would make of that statement would be to substitute the word "hole" for "pit"? A. Yes.

The Court: You used the word "hole"? A. Yes.

The Court: Bring the jury in. [Tr. p. 154.]

Mr. Herron: If Your Honor please, before the jury returns, we wish to enter our objection to this entire proceeding on the ground, first, that there has been no reluctance shown on the part of the witness to testify to the truth; second, that it is examining him upon a statement admittedly employing the words of a government agent, rather than his own words, and I know, without any intention on the part of the court, nevertheless we feel that we must object upon the ground that the questioning by the court out of the presence of the jury upon this statement can have no other effect than to intimidate the witness and to cause him to feel that he must now in effect make his statement conform to the language used in this statement, which was prepared by Spencer, and read over and signed by him.

The Court: Well, Mr. Amsbaw, all this court wants of you is to tell all of the truth about this, not to keep anything back.

The Witness: Well, I will tell you—

The Court: Just a minute now. Wait until I get through. We want you to tell the truth. The court is not trying to intimidate you, and vou don't understand that, certainly. He has said here several times in this court that this man actually did say he had been digging a hole. If that is true, we want you to tell this jury. If it isn't true, we don't want

it at all. The court is taking no sides in this case at all, but we are insistent that we shall get all of the truth.

Mr. Herron: We object and ascribe that statement as error, upon the ground that it can have no effect [Tr. p. 155] unwitting though the court may be about it, than to intensify in the mind of the witness the thought that the court might feel that he is not telling the truth, and put him under compulsion to tell another or different story than he was testifying to under oath.

The Court: Well, is it the truth that you used the word "hole"?

The Witness: Yes.

The Court: Bring in the jury.

(The jury returned into the courtroom.)

Mr. Ohannesian: Now, Mr. Amsbaw—

The Court: The court will ask this question.

Mr. Ohannesian: Pardon me, Your Honor.

The Court: Now, Mr. Amsbaw, in the absence of the jury has your memory been refreshed as to what Mr. Bruno said to you at the time he first came to get the horses in company with Mr. Quirin?

Mr. Herron: If the court please, we object to this question and each and every question which shall hereafter be asked of this witness along the general line, for the reasons which I stated to Your Honor in the absence of the jury, and each of those reasons.

The Court: Now, that objection of yours in the presence of this jury makes it necessary for this court, in order to protect the court, to go something into the reasons why this thing is done. We had hoped to make it unnecessary in the interest of the defense to do that. I will proceed to do it now. You have opened the door.

Mr. Graham: May I state we object to the court making the statement as to the reasons? [Tr. p. 156.]

The Court: You are not going to make any statement to the jury. We are going to interrogate this man and get the reason.

Mr. Graham: Exception.

Q. By the Court: Now, Mr. Amsbaw, in February of this year you made a statement about these matters to one of the government agents, Mr. Spencer, didn't you? A. Yes.

Q. And that was reduced to writing?

Mr. Herron: In addition to the objection I made, I desire to object on the ground it is an attempt to impeach the testimony of the government's own witness.

The Court: No, it isn't. It is an attempt to get all of the testimony of the government's witness.

Mr. Herron: An exception, if Your Honor please.

The Court: It is not an attempt to impeach him at all.

Q. That was Mr. Spencer, wasn't it? A. Yes.

Q. And after you told him all you knew he reduced it to writing, didn't he? A. Yes.

Q. And you signed it after reading it over; that is true, isn't it? A. Yes.

Q. And, having seen that document, your memory is refreshed as to what happened? A. Yes. [Tr. p. 157.]

Q. That is what you told the court in the absence of the jury, isn't it? A. Yes.

Q. Now, tell this jury substantially what Mr. Quirin said to you was the reason he wanted these horses—or that Mr. Bruno said to you when he and Mr. Quirin came in July last to get your team and rent it of you? A. My understanding was—

Q. What did he say in substance, now? What did he say that he wanted the horses for? A. He wanted the horses to level the dirt down from a hole. That is what he spoke to me about.

Q. What did he say, if anything, about having theretofore dug a hole? A. He had dug a hole and he wanted to level the dirt down. At that time I offered to work for him, drive my own team, and he rejected it. He said he had a man.

Mr. Ohannesian: Your Honor, at this time, if the court deems it necessary, I now submit the written statement that Your Honor has referred to, and, in view of the fact that it was used in order to refresh his recollection as to what was said by the defendant Bruno to him, it is offered in evidence in support of the testimony given by the witness.

Mr. Graham: We object to it on the ground that it is an attempt to impeach the witness.

Mr. Ohannesian: It is not for that, and I so stated.

The Court: If this is your only objection, it is overruled. [Tr. p. 158.]

Mr. Herron: And we object on the further ground it is hearsay, incompetent, irrelevant and immaterial, being an *ex parte* statement not made from the witness stand, and admittedly, as stated by this witness, not containing his words but the words of the agent.

Mr. Ohannesian: There is no such evidence as that at all.

The Court: That should not have been said in the presence of this jury.

Mr. Ohannesian: Counsel knows that and he ought to be cited for contempt for making such a statement, Your Honor.

Mr. Herron: It is part of my objection.

The Court: But you should not have said that in the presence of this jury.

Mr. Ohannesian: That is a matter I avoided by asking the jury to leave.

Mr. Herron: Then I will ask the court to instruct the jury to disregard it, or I will ask the witness the question in the presence of the jury.

Mr. Ohannesian: The statement is not a subject of cross-examination. It was not used for that purpose and counsel knows it. From his long experience he knows that his conduct is not correct.

Mr. Herron: I believe my conduct is correct.

The Court: We will have no controversy on that subject at all, but we will not submit this statement to the jury because the jury has from this witness the substance of it.

Mr. Herron: Then we will ask that the comments of the court as to what the statement contained, contained [Tr. p. 159] in the court's questions to the witness on the statement, be stricken.

The Court: I beg your pardon. What do you want stricken?

Mr. Herron: The remarks of the court purporting to read from the statement.

Mr. Graham: The statement of Your Honor which is, in effect, a statement of what the witness' statement contains, when Your Honor said that since the jury had returned he had testified substantially—

The Court: You don't mean to question the court's truthfulness about it?

Mr. Graham: Not at all, Your Honor.

Mr. Herron: Merely the correctness in point of law of the court's action; certainly not the court's truthfulness.

The Court: This is made a part of the record. Exceptions by each defendant.

Mr. Herron: Thank you, Your Honor.

The Court: The jury will determine whether the court misread that.

Mr. Herron: We don't want to be misunderstood as questioning the court's truthfulness.

The Court: That is what it amounted to.

Mr. Herron: We object to it on legal grounds.

The Court: Never mind; it is in. We will not talk about it any more.

Mr. Herron: If the court please, I feel counsel is entitled to have this court and jury understand that at no time did we reflect upon the truthfulness or the fairness [Tr. p. 160] of interpretation of this or any other district judge. I have practiced too long in these courts not to know the high character of federal judges and their honesty and sincerity, to have any such imputation put upon anything I might ever do. I do feel, however, in justice to the defendants I represent, that if the court has committed error, I should preserve that fact in the record in the event the case should be taken up on appeal.

Mr. Graham: We mean legal error and not an error in the statement of the court.

The Court: There is no question about. You are all right on that. We are not questioning that, but this statement is now in.

Q. What difference is there between the statement as given to Mr. Spencer and reduced to writing by him, to which your attention was drawn, and what you have said to the jury as to the purpose for which Mr. Bruno said he wanted the team?

Mr. Herron: We object to that on the ground it is not the best evidence. The statement is in and the testimony of the witness is in the record, and that is the best evidence.

The Court: All right. You admit the statement?

Mr. Herron: No, we don't admit it. It is in the record over our objection.

The Court: Then you are waiving your objection.

Mr. Herron: I do not desire to be so understood. I protest against any such interpretation of my statement. I merely called the court's attention to the fact that the statement being evidence and this witness having testified [Tr. p. 161] that a comparison of this statement which Your Honor admitted in evidence and gave us an exception to its admission,

and the record of the testimony of the witness, is not the best evidence. My objection goes to that.

The Court: You are extremely difficult to please. I hope I please you now. The court said to this jury, to which you took exception, that there was no substantial difference between the statement and the witness' testimony, and for that reason we would not permit the statement to go in. Then when we undertook to discover whether there was any substantial difference between the statement and the testimony of the witness, you objected because you say the statement is in. You can't have that thing both ways, so we will leave it just as it is. Go on to something else.

Mr. Herron: An exception.

(Counsel for all of the defendants announced they did not desire to cross-examine this witness.)

(Whereupon the court made the following statement):

The Court: Now, gentlemen, about this statement, before we go any further. If you discover anything of substance in the statement to which the witness has not testified, why, to that extent, of course, you ought not to have this statement put in against you. You may examine it and see.

Mr. Ohannesian: I may state, for the purposes of the record, that I gave to the counsel an original duplicate copy of the statement before the witness was examined, and they had it before them when the examination took place. [Tr. p. 162.]

Mr. Herron: That is, you mean before the witness was interviewed, following the first portion of your examination.

Mr. Ohannesian: Following the first portion, and you have had it with you ever since.

Mr. Herron: Yes.

The Court: If there is anything in that statement to which the witness has not testified substantially to this jury, the court will strike that part

out, if you ask the court to. You have the opportunity. Swear this witness."

The following is the written statement referred to:

State of California, County of Los Angeles—ss.

I, Fred C. Ansbaw, General Delivery, Elsinore, California, deposes and says:

That, Nick Bruno rented a team of horses from me the latter part of July, 1929, said he had been digging a pit on his ranch and wanted to level down the dirt. I asked to go along to drive my team, but Nick refused, said me had a man to drive it. Paid me $2.00 a day to use this team and kept it about one week. When Nick came to my place to make arrangements for this team, a fellow by the name of Herman Quirin came with him. Nick made arrangements for the team and Quirin drove it away. The team was returned to me in about one week by a boy, whom I do not know. Nick also used this team to haul bale and loose cut hay in June, 1929, to the ranch where the still was located. I know he took the hay to his ranch because I saw it stacked there on the ranch afterwards.

I saw Nick Bruno on the ranch where the still was located several times after July, 1929. The last time I saw him was when I was passing along the highway which leads from Perris to Elsinore, when Nick drove up from his ranch to the highway in a Ford truck loaded with hay, this was in November, 1929. The reason I remember the date, I was working in Perris at the time and was on my way home to Elsinore.

FRED C. ANSBAW
Fred C. Ansbaw

Subscribed and sworn to before me this 7 day of February, 1930.

O. G. SPENCER, *Investigator.*

Which exhibit was endorsed by the clerk as follows: 9926 M Crim. Special Exhibit. On examination of witness Ansbaw marked in evidence by direction of court, March 21, 1930.

R. S. ZIMMERMAN, *Clerk,*
By LOUIS J. SOMERS, *Deputy.*

APPENDIX "D".

Errors Assigned. [Tr. pp. 270 to 275.]

Comes now Peter Conley and Herman F. Quirin, the defendants above named, and file the following statement and amended assignment of errors, upon which they and each of them will rely in the prosecution of their appeal in the above entitled cause.

I.

That the court erred in excusing the jury and in questioning the witness, Richard Kelley, and by striking the bench with his fist and by conducting himself in such a manner, during such questioning, as to terrorize and intimidate the said witness Kelley, in the absence of the jury, and to frighten the said witness Kelly into testifying in part as it is apparent from the record the court desired him to testify.

II.

That the court erred in refusing to allow counsel for the defendants, or any of them, to interrogate the witness Kelley out of the presence of the jury, after the court had questioned such witness out of the presence of the jury.

III.

That the court erred in then questioning the witness Kelley in the presence of the jury after the court had, out of the presence of the jury, intimidated the said witness Kelley as aforesaid.

IV.

That the court erred in intimidating the witness Charles Cruse by ordering the arrest of the witness Kelley at

the conclusion of the testimony of the witness Kelley, because the court was not satisfied with the testimony of the said witness Kelley.

V.

That the court erred in excusing the jury and in questioning the witness Amsbaw in such manner as to intimidate the witness Amsbaw.

VI.

That the court erred in then questioning the witness Amsbaw in the presence of the jury after the court had, out of the presence of the jury, intimidated the said witness Amsbaw as aforesaid.

VII.

That the court erred in denying the motion of each of said defendants for a directed verdict of not guilty, made at the conclusion of the government's case and renewed at the close of the entire case, which said motions were made upon the ground of the insufficiency of the evidence as to each defendant and as to each and every count of the indictment.

VIII.

That the court erred in refusing to give the jury instructions numbers 1, 9, 11 and 14, which instructions were requested by all defendants, and to which refusal the said defendants excepted.

IX.

That the court erred in instructing the jury as a matter of law that there was sufficient evidence in the record to justify the conviction of each and every defendant charged in the indictment as to each count.

X.

That the court erred in permitting counsel for the government to misquote the evidence, and in refusing the defendants' request to instruct the prosecuting attorney not to misquote the evidence, and in refusing to instruct the United States attorney to correct his misstatements, which said misstatements were specifically pointed out to the court and excepted to.

XI.

That the court erred in his language and manner in criticizing counsel for the defendants for calling such errors to the attention of the court.

XII.

That the court erred in accusing counsel for the defense of questioning the court's veracity with reference to the written statement of the witness Amsbaw which was admitted in evidence as special exhibit admitted by direction of the court.

XIII.

That the court erred in refusing to instruct the jury to disregard the statement that counsel for defendants had questioned the court's veracity.

XIV.

That the court erred in denying the defendants' motion to strike out and to instruct the jury to disregard the court's statement purporting to disclose the contents of the said written statement of the said witness Amsbaw.

XV.

That the court erred in permitting the United States attorney to state in the presence of the witness, Cruse,

an employee of the witness, Kelley, that the said Kelley had said "Well, they didn't get anything out of me. I could not read or write and they wanted to give me some glasses to read with and I had my glasses in my pocket all the time."

XVI.

That the court erred in not permitting counsel for defendants to cross-examine the witness Kelley with reference to an impediment in the speech of the person referred to in the testimony of said Kelley as P. Walker.

XVII.

That the court erred in advising counsel making objections on behalf of the defendants that he was "too sensitive" about misstatements of the United States attorney in his closing argument when said counsel called the attention of the United States attorney to misstatements of the evidence with reference to the testimony concerning the teams which had been rented by the defendant Bruno, and further erred in suggesting that said counsel "take something" for said sensitiveness.

XVIII.

That the court erred in permitting the United States attorney in his closing argument to make the statement that the defendant, Quirin paid for the team with which the seeding about the still was done.

XIX.

That the court erred in refusing to instruct the United States attorney not to misquote the evidence with reference thereto.

XX.

That the court erred in permitting the United States attorney to repeat said misstatement after his attention had been previously directed to it, and in criticizing counsel for the defendants for so directing his attention.

XXI.

That the United States attorney was guilty of misconduct in stating inferentially in his opposing argument that Herman Quirin had a herd of 800 goats and that said goats were to be used in connection with a cheese factory. That the court was guilty of misconduct in criticizing counsel for the defendants for calling the attention of the court to the said misstatement and in stating "he (the United States attorney) is not making any misstatement".

XXII.

That the United States attorney was guilty of misconduct in stating in his closing argument "and when Mr. Herron, the former district attorney of the United States, makes that statement, I am forced to say that is because he is employed by the defendants and he is obliged to defend them at any cost".

XXIII.

That the court was guilty of misconduct in stating during the closing argument of the United States attorney with reference to the remark in assignment No. XXII, "I think there has been unusual aggravation of Mr. Ohannesian and he naturally yielded to it, but I hope he will be permitted to continue with his argument and I hope he will not permit himself to be aggravated by

these unnecessary and irritating interruptions in making some extravagant remarks hereafter."

XXIV.

That the court erred in instructing that the proof offered by the government, if uncontradicted and unexplained, would justify a conviction of all of the defendants.

XXV.

That the court erred in instructing the jury that the jury would be warranted from the evidence in concluding that Quirin permitted water to be taken from his premises knowing that it was to be used in a still.